

1 UNITED STATES DISTRICT COURT
 2 NORTHERN DISTRICT OF CALIFORNIA
 3 SAN JOSE DIVISION
 4

5 IN RE: HIGH-TECH EMPLOYEE) C-11-02509 LHK
 6 ANTITRUST LITIGATION,)
 7) SAN JOSE, CALIFORNIA
 8)
 9) JUNE 19, 2014
 10)
 11 THIS DOCUMENT RELATES TO:)
 12 ALL ACTIONS) PAGES 1-76
 13)
 14)

10 TRANSCRIPT OF PROCEEDINGS
 11 BEFORE THE HONORABLE LUCY H. KOH
 12 UNITED STATES DISTRICT JUDGE

13 A P P E A R A N C E S:

14 FOR THE PLAINTIFFS: JOSEPH SAVERI LAW FIRM
 15 BY: JOSEPH SAVERI
 255 CALIFORNIA STREET, SUITE 450
 16 SAN FRANCISCO, CALIFORNIA 94111

17 LIEFF, CABRASER,
 18 HEIMANN & BERNSTEIN
 19 BY: KELLY M. DERMODY
 20 BRENDAN P. GLACKIN
 21 DEAN M. HARVEY
 275 BATTERY STREET, 30TH FLOOR
 22 SAN FRANCISCO, CALIFORNIA 94111

23 APPEARANCES CONTINUED ON NEXT PAGE

24 OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
 25 CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
 TRANSCRIPT PRODUCED WITH COMPUTER

1 APPEARANCES (CONTINUED)

2 FOR THE PLAINTIFFS: JOSEPH SAVERI LAW FIRM
3 BY: JOSEPH R. SAVERI
4 505 MONTGOMERY STREET, SUITE 625
 SAN FRANCISCO, CALIFORNIA 94111

5 FOR DEFENDANT KEKER & VAN NEST
6 GOOGLE: BY: ROBERT A. VAN NEST
 JUSTINA K. SESSIONS
7 633 BATTERY STREET
 SAN FRANCISCO, CALIFORNIA 94111

8 FOR DEFENDANT O'MELVENY & MYERS
9 APPLE: BY: GEORGE A. RILEY
 CHRISTINA BROWN
10 TWO EMBARCADERO CENTER
 28TH FLOOR
11 SAN FRANCISCO, CALIFORNIA 94111

12 FOR DEFENDANTS JONES DAY
13 ADOBE: BY: LIN W. KAHN
 555 CALIFORNIA STREET, 26TH FLOOR
 SAN FRANCISCO, CALIFORNIA 94104

14 FOR DEFENDANT MUNGER, TOLLES & OLSEN
15 INTEL: BY: STEVEN M. PERRY
 355 SOUTH GRAND AVENUE, 35TH FLOOR
16 LOS ANGELES, CALIFORNIA 90071

17 FOR MICHAEL DEVINE: GIRARD GIBBS
18 BY: DANIEL C. GIRARD
19 601 CALIFORNIA STREET, 14TH FLOOR
 SAN FRANCISCO, CALIFORNIA 94108

20
21
22
23
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25

1 SAN JOSE, CALIFORNIA

JUNE 19, 2014

2 P R O C E E D I N G S

3 (COURT CONVENED AT 1:50 P.M.)

4 THE CLERK: CALLING CASE NUMBER C-11-02509 LHK, IN
5 RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION.

6 MS. DERMODY: GOOD AFTERNOON, YOUR HONOR.
7 KELLY DERMODY FROM LEIFF CABRASER. WITH ME ARE MY PARTNERS,
8 BRENDAN GLACKIN AND DEAN HARVEY.

9 MR. SAVERI: GOOD AFTERNOON, YOUR HONOR.
10 JOSEPH SAVERI.

11 MR. GIRARD: GOOD AFTERNOON. I'M DAN GIRARD
12 APPEARING FOR CLASS REPRESENTATIVE MICHAEL DEVINE.

13 THE COURT: OKAY.

14 MR. VAN NEST: GOOD AFTERNOON, YOUR HONOR.
15 BOB VAN NEST, KEKER & VAN NEST, HERE FOR GOOGLE, AND I'M HERE
16 WITH JUSTINA SESSIONS.

17 THE COURT: OKAY.

18 MR. RILEY: GOOD AFTERNOON, YOUR HONOR. GEORGE RILEY
19 OF O'MELVENY & MYERS. I REPRESENT APPLE. I'M HERE WITH MY
20 COLLEAGUE, CHRISTINA BROWN.

21 MS. KAHN: GOOD AFTERNOON. LIN KAHN FROM JONES DAY
22 ON BEHALF OF ADOBE.

23 MR. PERRY: AND STEVE PERRY FROM MUNGER TOLLES FOR
24 INTEL.

25 THE COURT: OKAY. GOOD AFTERNOON TO EVERYONE AND

1 WELCOME.

2 HOW MANY OPT OUTS TO THE LITIGATION CLASS WERE --

3 MS. DERMODY: YOUR HONOR, WE CAN GET THAT NUMBER FOR
4 YOU. IT WAS NOT VERY MANY.

5 THE COURT: OKAY. HOW MANY OPT OUTS WERE THERE TO
6 THE LUCASFILM/PIXAR SETTLEMENT?

7 MS. DERMODY: I THINK IT WAS 160, SOMEWHERE IN THERE,
8 155 OR SOMETHING LIKE THAT, YOUR HONOR. IT WAS IN YOUR ORDER.

9 AND THERE WERE NOT THAT MANY MORE THAT WERE JUST
10 LITIGATION. IT WAS DE MINIMIS.

11 THE COURT: OKAY. WHAT ABOUT FOR INTUIT CLASS? ARE
12 THOSE --

13 MS. DERMODY: I MEAN ALL TOGETHER.

14 THE COURT: IF I REMEMBER, THOSE WERE THE SAME.

15 MS. DERMODY: YES.

16 THE COURT: THEY OPTED OUT OF BOTH. BUT DID THEY
17 ALSO OPT OUT OF THE LITIGATION CLASS SIMULTANEOUSLY, OR NOT?

18 MS. DERMODY: THERE WERE SOME THAT DID. IT WAS KIND
19 OF A MIX, DIFFERENT BUCKETS. THERE WERE MOSTLY PEOPLE THAT IF
20 THEY OPTED OUT, THEY OPTED OUT OF THE SETTLEMENTS OF THE PIXAR,
21 LUCAS, AND INTUIT, AND THEN THERE WERE SOME ADDITIONAL ONES
22 THAT OPTED OUT OF THE LITIGATION THAT WAS ONGOING.

23 THE COURT: SO YOU DON'T KNOW THE NUMBER OF THE
24 LITIGATION OPT OUTS AT THIS TIME?

25 MS. DERMODY: ONLY THAT IT WAS RELATIVELY NOT THAT

1 MANY MORE PEOPLE, YOUR HONOR. IT WAS A SMALL NUMBER OF PEOPLE.

2 MAYBE YOU ALL REMEMBER IT BETTER THAN I DO, BUT IT WAS

3 TOTAL --

4 THE COURT: DOES ANYBODY KNOW?

5 MS. DERMODY: TOTAL OPT OUTS? IT WAS IN THE LOW

6 HUNDREDS. WE CAN GET THAT RIGHT NOW.

7 THE COURT: IS THAT GOING TO COUNT TOWARDS THE 4

8 PERCENT OPT OUTS?

9 MS. DERMODY: IT'S NOT, YOUR HONOR, NO. THIS WOULD
10 BE 4 PERCENT ON TOP OF WHAT HAS ALREADY BEEN AN OPT OUT NUMBER.

11 AND GIVEN THE --

12 THE COURT: I GUESS I DON'T UNDERSTAND. 4 PERCENT ON
13 TOP OF IT --

14 MS. DERMODY: SO THERE ARE SOME PEOPLE THAT ARE NO
15 LONGER IN THE CLASS BECAUSE THEY'VE OPTED OUT. AS THE CASE IS
16 CURRENTLY COMPOSED, THOSE PEOPLE DO NOT EXIST IN THE CASE
17 ANYMORE.

18 THE COURT: UM-HUM.

19 MS. DERMODY: THE PRO RATA REDUCTION THAT YOU SAW,
20 YOUR HONOR, IN THE SETTLEMENT AGREEMENT WOULD ONLY KICK IN IF
21 THEY KNEW 4 PERCENT, SOMETHING IN EXCESS OF 2500 PEOPLE NOW, IN
22 ADDITION, OPTED OUT.

23 SO IT WOULD BE A SIGNIFICANTLY LARGER, EXPONENTIALLY
24 LARGER NUMBER OF PEOPLE THAN OPTED OUT THE FIRST TIME.

25 THE COURT: YOU KNOW, THE SETTLEMENT WITH LUCASFILM,

1 PIXAR, AND INTUIT DIDN'T HAVE THIS 4 PERCENT REVERTER. WHY --
2 IN SOME SENSES, LUCASFILM AND PIXAR, AS WELL AS INTUIT, ARE
3 PAYING MORE OF THEIR -- A HIGHER PROPORTION OF THEIR LIABILITY
4 THAN GOOGLE, APPLE, INTEL, AND ADOBE. WHY IS THAT?

5 MS. DERMODY: THERE WAS A PRO RATA REDUCTION THAT
6 WOULD KICK IN THAT WAS SET FORTH IN THOSE OTHER SETTLEMENT
7 AGREEMENTS. IT WAS A -- I THINK IT WAS 10 PERCENT OR SOMETHING
8 IN PIXAR, LUCAS, AND INTUIT. SO THE CONCEPT EXISTED IN THE
9 PRIOR SETTLEMENT AGREEMENTS.

10 HERE WE -- IT JUST WAS DIFFERENT DEFENDANTS, DIFFERENT
11 NEGOTIATIONS, DIFFERENT TERMS THAT WERE BEING DISCUSSED.

12 AND SO WE HAD THE SAME CONCEPT, THAT THERE BE SOME NUMBER
13 OF PEOPLE -- THERE WAS SOME PRICE POINT AT WHICH, FOR THE
14 DEFENDANTS TO HAVE TO PAY, FROM THEIR POINT OF VIEW, HAVE TO
15 PAY INTO A CLASS FUND WHILE LEAVING OPEN THE LIABILITY OF
16 THOUSANDS OF PEOPLE SEEMED TO BE, AS THEY EXPRESSED IT,
17 SOMETHING THAT SHOULD BE ACCOUNTED FOR.

18 SO IT WOULDN'T BE LESS CONSIDERATION TO THE CLASS. IT
19 WOULD BE JUST A PRO RATA REDUCTION THAT WOULD KICK IN. THE
20 SAME NUMBER OF PEOPLE WOULD HAVE THE SAME NET RESULT OF THE
21 CASE IF YOU HIT A CERTAIN THRESHOLD, AGAIN, ONE THAT I, AS
22 CLASS COUNSEL, DON'T THINK WILL BE REACHED, BUT WHICH IS KIND
23 OF A BACKSTOP FOR THE DEFENDANTS IN THE EVENT THAT IT IS.

24 THE COURT: OKAY. I'M UNCLEAR. YOU'RE SAYING THERE
25 WAS A 10 PERCENT REVERTER IN THE LUCASFILM, PIXAR, AND INTUIT

1 SETTLEMENT?

2 MS. DERMODY: THERE WAS A --

3 THE COURT: I DON'T HAVE THAT.

4 MS. DERMODY: IT'S IN THE SETTLEMENT AGREEMENT, YOUR
5 HONOR. WE CAN PULL IT UP.

6 THE CONCEPT OF THERE BEING A PRO RATA REDUCTION FOR A
7 CERTAIN NUMBER OF OPT OUTS AND THE CONCEPT OF THERE BEING A
8 TERMINATION POSSIBILITY WITH A CERTAIN NUMBER OF OPT OUTS WAS
9 SOMETHING THAT HAPPENED IN THE PRIOR SETTLEMENT AGREEMENTS.

10 THE COURT: OH, OKAY. CAN I SEE THAT? BECAUSE I'M
11 SORRY, I DON'T RECALL THAT.

12 MS. DERMODY: YES, YOUR HONOR. WE'LL FIND THAT FOR
13 YOU. I'M AFRAID I DON'T HAVE IT IN FRONT OF ME. I DIDN'T
14 BRING THAT WITH ME TODAY.

15 THE COURT: OKAY.

16 MS. DERMODY: BUT WE'LL LOCATE IT.

17 THE COURT: OKAY.

18 MS. DERMODY: AND IF IT WOULD HELP YOUR HONOR --

19 THE COURT: IS PARVES SYED MOHAMED OBJECTING? I KNOW
20 YOU HAD A FOOTNOTE IN YOUR MOTION THAT YOU DIDN'T THINK THAT HE
21 WAS. WHAT DID YOU BASE THAT ON?

22 MS. DERMODY: A CONVERSATION WITH HIM, YOUR HONOR.
23 AT THE TIME THAT WE -- AFTER WE REVIEWED THAT LETTER, WE SPOKE
24 WITH HIM. IT WAS OUR UNDERSTANDING THAT HE HAD AN INTENT TO
25 WITHDRAW THAT OBJECTION.

1 TO DATE THAT HASN'T HAPPENED. I DON'T KNOW WHETHER OR NOT
2 HE CONTINUES TO WANT TO WITHDRAW THAT OBJECTION OR CONTINUES TO
3 WANT TO SAY THAT HE WANTS THERE TO BE MORE MONEY IN THE
4 SETTLEMENT. I'M NOT SURE EITHER WAY.

5 THE COURT: OKAY. AND IS MR. MOHAMMED HERE TODAY?

6 ALL RIGHT. LET ME GIVE MR. GIRARD AN OPPORTUNITY TO
7 RESPOND TO THE PLAINTIFFS' REPLY.

8 I'D ALSO LIKE TO ASK WHETHER MR. DEVINE ACTUALLY SENT THAT
9 MAY 11, 2014 LETTER TO THE COURT, BECAUSE I NEVER GOT IT. DO
10 YOU KNOW IF HE ACTUALLY SENT IT?

11 MR. GIRARD: I DO NOT KNOW THE ANSWER TO THAT
12 QUESTION AS TO WHETHER IT WAS ACTUALLY SENT. I BELIEVE IT WAS
13 FROM SPEAKING WITH HIM. AND IF YOU'D LIKE TO SEE IT, WE WILL
14 PRODUCE IT TO THE COURT.

15 WE HAVE TALKED WITH MR. DEVINE AT LENGTH AND COUNSELLED
16 HIM ON THE ISSUES SURROUNDING THE APPROVAL OF CLASS ACTION
17 SETTLEMENTS, AND THE OPPOSITION TO THE MOTION FOR PRELIMINARY
18 APPROVAL THAT WAS FILED ON HIS BEHALF REFLECTS HIS POSITION IN
19 OPPOSITION AND IT SUPERSEDES THE LETTER.

20 SO THESE ARE THE ARGUMENTS THAT HE IS ELECTING TO PUT
21 FORWARD IN OPPOSITION TO THE SETTLEMENT, AND I'M PREPARED TO
22 SPEAK TO THOSE IF THIS IS THE RIGHT TIME FOR THAT.

23 THE COURT: YES. I WOULD LIKE TO HEAR YOUR RESPONSE
24 TO THE PLAINTIFFS' REPLY.

25 MR. GIRARD: SURE.

1 THE COURT: OKAY.

2 MR. GIRARD: SO TO START WITH, THE ARGUMENT IS MADE
3 THAT THE SETTLEMENT IS LARGE, PUT IT THAT WAY, \$324.5 MILLION,
4 AND IT IS INDISPUTABLY A VERY LARGE AMOUNT OF MONEY.

5 THE PERSPECTIVE THAT MR. DEVINE IS APPROACHING IS HIS
6 PERSPECTIVE AS AN INDIVIDUAL. IT'S NOT LOOKING BACK AND
7 SAYING, "IS IT OR ISN'T IT A BIG AMOUNT OF MONEY?"

8 HIS PERSPECTIVE IS THAT WHAT THIS REPRESENTS FOR HIM IS
9 AROUND \$3500 TO \$3600, AND FOR THAT PRICE, IF YOU ASKED HIM,
10 "WOULD YOU BE WILLING TO GIVE THE DEFENDANTS THE RIGHT TO
11 MANIPULATE THE MARKET FOR THE SERVICES HE PROVIDES FOR FOUR
12 YEARS FOR \$3600, OR WOULD YOU PREFER TO TAKE YOUR CHANCES,
13 KNOWING THAT YOU MIGHT LOSE THAT MONEY, BUT YOU MIGHT ALSO GET
14 A LOT MORE?"

15 AND SPECIFICALLY HERE WE THINK THAT IF THE PLAINTIFFS WIN
16 UNDER THEIR MODEL, THAT LOT MORE IS \$144,000, APPROXIMATELY.

17 I THINK, IF HE'S RATIONAL, HIS ANSWER -- AND HE IS -- AND
18 HIS ANSWER IS, "WHAT ARE MY CHANCES? ARE MY CHANCES 97 AND A
19 HALF PERCENT THAT I WILL DO WORSE THAN THIS \$3600?"

20 AND HE SAYS, "GIVEN THOSE ODDS, I DON'T THINK SO. I'LL
21 TAKE MY CHANCES ON AN INDIVIDUAL LEVEL."

22 AND HE'S HERE SPEAKING FOR THAT PERSPECTIVE, WHICH IS THAT
23 HE'S PREPARED TO PUT THIS AMOUNT OF MONEY AT RISK BECAUSE THE
24 AMOUNT THAT HE GETS SPECIFICALLY INDIVIDUALLY, NOTWITHSTANDING
25 HOW BIG THE SETTLEMENT IS, IS INSUFFICIENT, IN HIS MIND, IN

1 RELATION TO WHAT HE STANDS TO GAIN IF THIS CASE GOES FORWARD.

2 NOW, IT'S TRUE THAT THE AMOUNT OF MONEY THAT COUNSEL
3 OBTAINED -- AND TO BE CLEAR, THIS IS AN OBJECTION TO THE
4 SUFFICIENCY OF THE RECOVERY. IT'S NOT AN OBJECTION TO THE
5 ADEQUACY OF REPRESENTATION. SO WE'RE NOT CLAIMING THAT COUNSEL
6 WAS -- SOLD OUT THE CASE BECAUSE THEY GOT TOGETHER WITH THE
7 DEFENDANTS AND ENTERED INTO A COLLUSIVE SETTLEMENT. THAT
8 WOULDN'T BE A SERIOUS CLAIM AND THAT'S NOT THE CLAIM BEING
9 MADE. THE CLAIM GOES SOLELY TO THE SUFFICIENCY OF THE
10 RECOVERY.

11 AND THE ARGUMENT THAT MR. DEVINE MAKES IS THAT IF YOU LOOK
12 AT THIS SETTLEMENT, YES, IT'S TRUE THAT IT'S 325 MILLION, BUT I
13 CAN'T THINK OF ANY OTHER TYPE OF CASE THAT HAD THIS TYPE OF
14 EVIDENCE THAT WAS THIS CLOSE TO TRIAL.

15 SO, YES, IT'S A LOT OF MONEY. BUT IT'S ALSO A VERY, VERY
16 STRONG CASE, AND WHERE WE ARE HERE IS PRELIMINARY APPROVAL.

17 AND WE KNOW WHAT'S GOING TO HAPPEN HERE. IF THE COURT
18 ENTERS AN ORDER PRELIMINARILY APPROVING THE SETTLEMENT, NOTICE
19 WILL GO OUT AND SOME NUMBER OF CLASS MEMBERS WILL OBJECT TO THE
20 SETTLEMENT AND CLASS COUNSEL WILL SAY THAT NUMBER, WHATEVER IT
21 IS, IS SMALL IN RELATION TO THE TOTAL NUMBER OF CLASS MEMBERS,
22 AND THEY'LL PROBABLY BE RIGHT AND IT'S A LEGITIMATE ARGUMENT
23 AND I'VE MADE IT MANY TIMES AS CLASS COUNSEL.

24 BUT I THINK THE TREND IS TO TAKE THE HARD LOOK NOW RATHER
25 THAN DEFER TO FINAL APPROVAL, BECAUSE IF YOU ENTER PRELIMINARY

1 APPROVAL NOW, THE WRITING IS ON THE WALL THAT WE'LL GET TO THAT
2 POINT AND THEY'LL SAY IT'S A SMALL AMOUNT AND, THEREFORE, THE
3 MOST -- MOST OF THE CLASS IS HAPPY WITH THE SETTLEMENT AND THE
4 COURT SHOULD APPROVE IT.

5 WHAT'S UNIQUE ABOUT THIS CASE, I THINK -- AND PLAINTIFFS'
6 COUNSEL POINTED OUT THAT MOST OF THE CASES WHERE THE COURTS ARE
7 PUSHING BACK AT PRELIMINARY APPROVAL, A NUMBER OF THOSE CASES
8 INVOLVE FAIRLY QUESTIONABLE SETTLEMENTS AND NOT THE BEST WORK
9 NECESSARILY DONE BY PLAINTIFFS' COUNSEL, AND THAT'S NOT THE
10 ARGUMENT WE'RE MAKING HERE.

11 BUT THIS COURT, IN THIS PARTICULAR CASE, IS UNIQUELY
12 SITUATED TO EXERCISE ITS DISCRETION AT THIS STAGE, AND THIS IS
13 REALLY WHAT PRELIMINARY APPROVAL IS, IS THE COURT ACTING AS A
14 GATEKEEPER.

15 YOU KNOW, WHAT'S INTERESTING ABOUT RULE 23 IS THERE'S
16 NOTHING IN THERE ABOUT PRELIMINARY APPROVAL. WE COULDN'T FIND
17 A SINGLE CIRCUIT LEVEL DECISION WHERE A COURT SAYS THIS IS THE
18 STANDARD THAT YOU, AS A DISTRICT COURT, ARE REQUIRED TO APPLY.

19 THE DISTRICT COURTS REPEAT THE STANDARD GENERALLY THAT THE
20 COURT IS MAKING AN OVERALL ASSESSMENT OF THE FAIRNESS AND
21 LOOKING FOR SIGNS OF COLLUSION.

22 BUT AT THE SAME TIME, THE INSTRUCTION IS TO THIS COURT TO
23 LOOK HARD AND, IF YOU HAVE CONCERNS, TO EXPRESS THOSE CONCERNS
24 NOW.

25 SO WHAT MR. DEVINE'S POSITION IS IS THAT FROM THE

1 PERSPECTIVE OF ANY INDIVIDUAL MEMBER OF THIS CLASS, IF YOU'RE
2 PRESENTED WITH THE BARGAIN OF CONSENTING TO THIS CONDUCT AND
3 ENTERING INTO A RELEASE, IF YOU LOOK AT IT FROM HIS INDIVIDUAL
4 PERSPECTIVE, LIKE A PERSONAL INJURY CASE, IF HE'S GIVEN THE
5 CHOICE OF TAKING \$3600 OR PLAYING IT FORWARD FOR THE
6 POSSIBILITY OF DOING A LOT BETTER, AND WHEN YOU LOOK AT THE
7 CONDUCT INVOLVED AND YOU THINK ABOUT WHAT THE DEFENDANTS DID
8 HERE AND HOW THAT AFFECTED THE MARKET FOR THE SERVICES THAT HE
9 AND THE OTHER MEMBERS OF THE CLASS ARE PROVIDING, THAT THEY
10 WOULD PREFER TO TAKE THEIR CHANCES.

11 AND HE'S NOT SAYING -- HE'S NOT SAYING THAT THERE'S NO
12 SETTLEMENT EVER THAT COULD POSSIBLY BE SATISFACTORY TO HIM.
13 HE'S SAYING THAT HE LOOKS AT THIS AND HE THINKS THIS SETTLEMENT
14 IS SHORT OF THE MARK AND THAT IT WOULD BE WORTH IT --

15 THE COURT: HOW MUCH SHORT OF THE MARK DOES HE THINK
16 IT IS?

17 MR. GIRARD: I THINK HE -- HIS CONCERN WAS THAT HE
18 WAS CONCERNED WITH THE PROCESS, TO SOME EXTENT.

19 AND TO ANSWER THAT QUESTION, I GUESS I WOULD -- I WANT TO
20 GIVE A SPECIFIC RESPONSE RATHER THAN AN OVERLY GENERAL ONE.

21 I DON'T THINK WE'RE TALKING ABOUT MULTIPLES OF THIS
22 NUMBER. ONE THOUGHT THAT WE HAD, IN TERMS OF WHAT THIS COURT
23 MIGHT CONSIDER DOING, IS IF THE COURT SHARES ANY OF THESE
24 CONCERNS ABOUT THE SUFFICIENCY OF THE SETTLEMENT, TO GIVE THE
25 PARTIES AN OPPORTUNITY TO GO BACK TO THE TABLE WITH MR. DEVINE

1 REPRESENTED, ALONG WITH CLASS COUNSEL, AND SEE IF, IN THE
2 CONTEXT OF THE MEDIATION, THE DEFENDANTS ARE WILLING TO PAY ANY
3 MORE IN SETTLEMENT.

4 IF THE ANSWER IS NO, THEN THE COURT CAN RULE ON THIS
5 MOTION AS IT'S BEEN PRESENTED TO THE COURT.

6 IF WE'RE ABLE TO COME BACK WITH A SUBSTANTIALLY IMPROVED,
7 OR EVEN A MODESTLY IMPROVED SETTLEMENT, THE COURT WILL HAVE A
8 DIFFERENT CALCULUS IN FRONT OF IT AND PROBABLY A SETTLEMENT
9 THAT ALL THE CLASS REPRESENTATIVES SUPPORT.

10 THAT'S A PROCESS WE'D BE WILLING TO TAKE ON IF THE COURT
11 IS SO INCLINED.

12 AND --

13 THE COURT: WHAT ABOUT MR. DEVINE JUST OPTING OUT AND
14 LITIGATING HIS OWN INDIVIDUAL CASE?

15 MR. GIRARD: WELL, THAT'S A POSSIBILITY AND WE'VE
16 CERTAINLY TALKED WITH HIM ABOUT THAT.

17 THE SITUATION FROM HIS POINT OF VIEW, IT'S THE SAME
18 SITUATION THAT WAS DISCUSSED RECENTLY BY THE SUPREME COURT IN
19 THE ITALIAN COLORS CASE ON ARBITRATION. HE'S GOING TO BE
20 LOOKING THEN AT A CLAIM THAT'S WORTH, ON AVERAGE, \$140,000
21 TREBLED, AND HE'S GOING TO BE LOOKING AT EXPENSES FOR EXPERTS
22 THAT ARE GOING TO BE MANY MULTIPLES OF THAT.

23 SO THE OPT OUT RATE HERE IS A, YOU KNOW, RELATIVELY WEAK
24 EXPEDIENT UNLESS THE VOLUME OF OPT OUTS ARE SUCH THAT IT'S
25 POSSIBLE TO AGGREGATE SOME GROUP OF PEOPLE WHO SHARE THE SAME

1 VIEW HE HAS AND WANT TO PROCEED.

2 THE COURT: WHAT ABOUT THE -- WHAT ABOUT THE SPECIFIC
3 ARGUMENTS THAT THE PLAINTIFFS MAKE IN THEIR REPLY THAT, YOU
4 KNOW, MR. -- DR. LEAMER ONLY PROVIDED A DAMAGES ANALYSIS FOR
5 THE OVERARCHING CONSPIRACY, AND IF THE JURY WERE TO FIND THAT
6 ONE OF THE SEVEN DEFENDANTS DIDN'T ACTUALLY JOIN IN THAT
7 CONSPIRACY, THERE WOULDN'T BE SORT OF AN ALTERNATIVE DAMAGES
8 CALCULATION FOR THE JURY TO RELY ON.

9 MR. GIRARD: SO THEY MADE A NUMBER OF ARGUMENTS LIKE
10 THAT.

11 THE COURT: YEAH.

12 MR. GIRARD: AND THERE WAS AN ISSUE ABOUT WHETHER THE
13 COURT WOULD ORDER THAT THE STANDARD IS GOING TO BE PER SE
14 VERSUS RULE OF REASON --

15 THE COURT: UM-HUM.

16 MR. GIRARD: -- A NUMBER OF EVIDENTIARY MOTIONS THAT
17 WERE BEFORE THE COURT, AND THE NEED FOR A UNANIMOUS JURY, ET
18 CETERA.

19 I MEAN, I PUT ALL OF THOSE UNDER THE UMBRELLA GENERALLY OF
20 TRIAL IS RISKY.

21 THE COURT: UM-HUM.

22 MR. GIRARD: BUT THIS IS NOT A SITUATION HERE WHERE
23 THE CASE IS, YOU KNOW, AT THE MOTION TO DISMISS STAGE, OR EVEN
24 AT THE SUMMARY JUDGMENT STAGE. I MEAN, WE'RE HERE POST CLASS
25 CERTIFICATION, POST RULE 23, VERY CLOSE TO TRIAL, AND THOSE ARE

1 ALL FAIR ARGUMENTS.

2 THE FLIP SIDE IS, WHAT ABOUT THE POSSIBILITY THAT THE
3 DEFENDANTS END UP HAVING TO PAY OVER A BILLION DOLLARS BEFORE
4 TREBLING?

5 THEY'RE EQUALLY LEGITIMATE POINTS TO CONSIDER.

6 SO WE'RE NOT -- I MEAN, THIS ISN'T THE OBJECTION WHERE
7 SOMEBODY COMES AND WAVES OFF ALL THE REALITIES AND RISKS OF
8 TRIAL. WE HAVE A TREMENDOUS LEVEL OF APPRECIATION FOR THE WORK
9 THAT'S GONE INTO THIS PROCESS AND HOW HARD COUNSEL HAVE WORKED.

10 THIS IS REALLY A CLASS REPRESENTATIVE WHO'S SPEAKING UP,
11 DOING THE RIGHT THING IN TERMS OF COMING FORWARD TO THE COURT
12 WITH THE BENEFIT OF HIS EXPERIENCE AND THE THOUGHT AND, TO SOME
13 EXTENT, THE PERSONAL TRAVAIL ALL FOUR OF THESE CLASS
14 REPRESENTATIVES HAVE SUFFERED PROFESSIONALLY FROM HAVING TO
15 TAKE ON THIS INDUSTRY AND THESE DEFENDANTS, AND I THINK THE
16 COST THAT THEY PERCEIVE IN THAT TO THEM AS FAR AS THE
17 PROFESSIONAL CONSEQUENCES THAT THEY MAY SUFFER FOR HAVING
18 BROUGHT THESE CASES AND SAYING, "SOMEHOW WE FEEL LIKE WE'VE
19 BEEN LEFT SHORT HERE, THAT THIS ISN'T THE KIND OF RESULT THAT
20 WE THOUGHT, WHEN WE GOT INTO THIS, WAS WHAT WE WERE LOOKING
21 FOR."

22 AND, YOU KNOW, YOU THINK ABOUT THIS -- AND I DON'T WANT TO
23 GET TOO PHILOSOPHICAL HERE, SO I'M GOING TO CUT TO THE POINT
24 HERE -- BUT YOU THINK ABOUT THIS COUNTRY AND HOW HARD PEOPLE
25 WORK TO GET THESE TYPES OF JOBS AND HOW IMPORTANT IT IS TO A

1 LOT OF THE, THE GENERATION OF PEOPLE THAT ARE COMING UP,
2 ENTERING THE WORK FORCE, THE SACRIFICES SOMEBODY LIKE
3 MR. DEVINE MADE, THE LOANS THEY TOOK OUT TO BE EDUCATED AND SO
4 FORTH, AND ANYTHING ABOUT THE RHETORIC THAT IS BEING SOLD BY
5 THE PEOPLE WHO ENTERED INTO THESE AGREEMENTS ABOUT FREE
6 ENTERPRISE AND INDIVIDUAL RESPONSIBILITY AND ON AND ON, AND YOU
7 LOOK AT THE FACT THAT THEY WERE GETTING TOGETHER AND FIXING THE
8 PRICE FOR THESE SERVICES.

9 I MEAN, I THINK FROM THEIR POINT OF VIEW, IT'S VERY TOUGH
10 TO GIVE IT UP AT THIS POINT FOR THE TRADE THAT I REFERRED TO,
11 THE \$3600 FOR THE RIGHT TO FIX THIS MARKET FOR FOUR YEARS.

12 AND SO THAT'S, THAT'S THE PERSPECTIVE IN WHICH HE IS
13 APPROACHING THE COURT TODAY.

14 THE COURT: ALL RIGHT. THANK YOU.

15 LET ME HEAR FROM THE PLAINTIFFS.

16 MS. DERMODY: YOUR HONOR, DO YOU WANT TO HEAR THE
17 HOUSEKEEPING THINGS FIRST IN RESPONSE TO YOUR QUESTIONS?

18 THE COURT: SURE. HOW MANY CLASS --

19 MS. DERMODY: SO FROM --

20 THE COURT: -- LITIGATION CLASS OPT OUTS WERE THERE?

21 MS. DERMODY: SIXTY-ONE.

22 THE COURT: OKAY.

23 MR. DERMODY: AND IN BOTH THE PIXAR, LUCAS, AND
24 INTUIT SETTLEMENTS, THERE WAS AN ATTACHMENT 1. SO IF YOUR
25 HONOR WAS LOOKING IN THE BODY OF THE SETTLEMENT AGREEMENTS, YOU

1 MIGHT NOT HAVE SEEN IT.

2 BUT IF YOU LOOK TO THE FIRST ATTACHMENT, IT'S IN THERE.
3 IT TALKS ABOUT A PRO RATA REDUCTION, AND IN PIXAR/LUCASFILM IT
4 WAS 10 PERCENT WAS THE THRESHOLD, AND ONCE YOU HAD 10 PERCENT
5 OPT OUTS, THEN YOU WOULD START HAVING A PRO RATA REDUCTION OF
6 THE CLASS CONSIDERATION.

7 THE COURT: WHY IS IT SO MUCH LOWER HERE?

8 MS. DERMODY: I THINK IT'S A DIFFERENT POINT IN THE
9 CASE, DIFFERENT ISSUES IN THE CASE IN TERMS OF CONCERNS ABOUT
10 OPT OUTS, YOUR HONOR.

11 I THINK THAT WAS REALLY ALL THAT WAS GOING ON. I MEAN --

12 THE COURT: OKAY. THE POINT IN THE CASE WOULD
13 ACTUALLY DICTATE FOR A HIGHER NUMBER, RIGHT? I MEAN THE --

14 MS. DERMODY: NOT IF YOU --

15 THE COURT: -- THE LUCASFILM/PIXAR/INTUIT FOLKS
16 SETTLED WHEN I HAD DENIED THE CLASS CERTIFICATION MOTION.

17 SO THESE DEFENDANTS SETTLED AFTER I HAD CERTIFIED THE
18 CLASS, AFTER THE NINTH CIRCUIT HAD REFUSED TO REVIEW MY CLASS
19 CERTIFICATION ORDER, AFTER I HAD DENIED SUMMARY JUDGMENT, AFTER
20 I HAD DENIED THE DAUBERT EXCLUDING DR. LEAMER'S DAMAGES
21 ANALYSIS.

22 MS. DERMODY: RIGHT.

23 THE COURT: SO IF ANYTHING, THAT NUMBER SHOULD BE
24 GOING UP AND NOT GOING DOWN.

25 MS. DERMODY: YOU WOULD THINK, IN GENERAL, THAT WOULD

1 BE TRUE FOR A LOT OF TERMS, YOUR HONOR.

2 THE COURT: UM-HUM.

3 MS. DERMODY: BUT ON THAT PARTICULAR ONE, AT THE TIME
4 OF THE PIXAR/LUCAS SETTLEMENT, AS YOU MIGHT REMEMBER, THERE WAS
5 NO PRIOR PRELIMINARY APPROVAL INFORMATION THAT ANYONE IN THE
6 CLASS MIGHT OBJECT TO THAT SETTLEMENT.

7 WE HAD A DIFFERENT SCENARIO HERE. SO IT WAS A
8 DIFFERENT -- IT WAS JUST A DIFFERENT -- THE PLACE WAS SET
9 DIFFERENTLY FOR THAT PARTICULAR TERM TO BE NEGOTIATED THAN IT
10 WAS AT THE TIME OF THE PIXAR/LUCAS SETTLEMENT, DIFFERENT FACTS
11 IN THE GROUND.

12 THE COURT: OKAY. SO TELL ME THEN WHAT YOU KNEW AT
13 THE TIME YOU SETTLED, BECAUSE MY UNDERSTANDING IS YOU DIDN'T
14 GET THESE OBJECTIONS UNTIL AFTER PEOPLE, SOMEBODY AT "THE
15 NEW YORK TIMES" LEAKED THE 324 MILLION NUMBER.

16 MS. DERMODY: RIGHT. I DON'T KNOW HOW THAT --

17 THE COURT: RIGHT. SO I GUESS I'M UNCLEAR. HOW ARE
18 OBJECTIONS THAT POST-DATED THE ANNOUNCEMENT OF THE SETTLEMENT
19 AMOUNT, THE ONES THAT MOTIVATED THE NUMBER DURING THE
20 SETTLEMENT NEGOTIATIONS THAT PRECEDED THAT NUMBER COMING OUT?

21 MS. DERMODY: WELL, AT THE --

22 THE COURT: DOES THAT MAKE SENSE TO YOU?

23 MS. DERMODY: YES, YOUR HONOR.

24 THE COURT: THAT DOESN'T MAKE SENSE TO ME.

25 MS. DERMODY: I UNDERSTAND THE QUESTION COMPLETELY.

1 I JUST WANT TO MAKE VERY CLEAR TO THE COURT THAT THE
2 PARTIES AGREED THAT THEY WOULD NOT RELEASE ANY OF THE TERMS
3 UNTIL THEY PRESENTED THEM TO YOUR HONOR. NO ONE ON THE
4 PLAINTIFFS' SIDE SPOKE TO ANY MEDIA ABOUT ANY OF THE SPECIFIC
5 TERMS OF THE SETTLEMENT. I DON'T KNOW WHERE "THE NEW YORK
6 TIMES" GOT THEIR INFORMATION. TO THIS DAY, I'M PERSONALLY VERY
7 UPSET THAT THAT INFORMATION WAS OUT THERE BECAUSE THE PARTIES
8 WERE STILL NEGOTIATING THE TERMS OF THE SETTLEMENT AGREEMENT.

9 SO THAT WAS STILL IN PLAY, THAT PARTICULAR TERM, AND THAT
10 PARTICULAR TERM WAS INFORMED BY FEEDBACK THAT HAPPENED, IN PART
11 FROM "THE NEW YORK TIMES," RIGHT AFTERWARDS.

12 SO YOU HAVE TO DEAL WITH THE FACTS IN THE GROUND THAT
13 HAPPENED AT THE TIME YOU'RE NEGOTIATING THOSE TERMS AND THAT IS
14 THE DIFFERENCE.

15 IF THAT TERM ITSELF IS THE STICKING POINT FOR YOUR HONOR,
16 ABSOLUTELY WE'RE GOING TO HAVE TO SORT OF GO AND ADDRESS THAT.

17 BUT I WANT YOUR HONOR TO UNDERSTAND THAT WE WEREN'T
18 DEALING WITH THE EXACT SAME INFORMATION ABOUT OPT OUTS THAT WE
19 WERE WHEN WE NEGOTIATED THE PIXAR/LUCASFILM --

20 THE COURT: I GUESS IT STILL DOESN'T MAKE SENSE TO
21 ME. YOUR JUSTIFICATION FOR THE NUMBER GOING DOWN IS BASED ON
22 OBJECTIONS THAT OCCURRED AFTER YOU HAD ALREADY AGREED TO THE
23 NUMBER.

24 MS. DERMODY: YOUR HONOR, IT'S A -- IT'S A FUNNY
25 POSITION --

1 THE COURT: BECAUSE YOU ANNOUNCED -- YOU SENT THE
2 LETTER TO ME THAT YOU HAD REACHED A SETTLEMENT AT ABOUT THE
3 EXACT SAME TIME.

4 MS. DERMODY: YES, YOUR HONOR.

5 THE COURT: SO I ASSUME WHEN YOU SENT THAT LETTER TO
6 ME, YOU HAD THIS 4 PERCENT NUMBER.

7 MS. DERMODY: NO. WE HAD THE -- I MEAN, YOUR HONOR
8 IS SORT OF ASKING ME TO REVEAL A LOT OF SETTLEMENT PRIVILEGES,
9 SO I'M HAVING A HARD TIME WITH THIS.

10 BUT I WILL TELL YOU THAT --

11 THE COURT: WELL, YOU'RE THE ONE THAT OPENED THE
12 DOOR. YOU'RE THE ONE THAT GAVE THAT AS THE JUSTIFICATION FOR
13 WHY THE NUMBER IS LOWER THAN 10 PERCENT TO 4 PERCENT, RIGHT? I
14 MEAN, IF YOU HADN'T OPENED THE DOOR, I WOULDN'T BE FOLLOWING
15 THIS LINE OF INQUIRY.

16 MS. DERMODY: I WANT TO MAKE SURE THE COURT
17 UNDERSTANDS, BECAUSE I APPRECIATE THE QUESTION. IT'S A
18 COMPLETELY FAIR QUESTION.

19 THE COURT: I GUESS I DON'T UNDERSTAND.

20 MS. DERMODY: THE 324. --

21 THE COURT: THE EARLIER DEFENDANTS SETTLED AT A POINT
22 WHEN THEY HAD MUCH MORE LEVERAGE.

23 THESE DEFENDANTS SETTLED AFTER THEIR LEVERAGE WAS LARGELY
24 GONE. AS SOON AS THE NINTH CIRCUIT SAID, "WE'RE NOT GOING TO
25 REVIEW THIS CLASS CERT ORDER," THEY WERE GOING TO BE FORCED TO

1 GO TO TRIAL, AND I SUSPECT THEY WOULD HAVE WON, IN WHICH CASE
2 THERE WOULD HAVE BEEN AUTOMATIC TREBLING.

3 NOW, GRANTED, I UNDERSTAND THE APPEAL RISKS.

4 BUT IT'S STILL -- FROM A NEGOTIATING STANDPOINT, THESE
5 DEFENDANTS SHOULD HAVE HAD LESS LEVERAGE THAN THE
6 LUCASFILM/PIXAR/INTUIT DEFENDANTS WHO SETTLED WHEN THE ONLY
7 ORDER WAS DENYING THE CLASS CERT MOTION.

8 MS. DERMODY: SO, YOUR HONOR --

9 THE COURT: SO WHY ARE THEY PAYING -- WHY ARE THE
10 EARLIER SETTLING DEFENDANTS BEING PENALIZED BY PAYING A HIGHER
11 PROPORTION OF THEIR DAMAGES LIABILITY THAN THESE DEFENDANTS?

12 MS. DERMODY: WELL, LET ME MAKE IT TOTALLY CLEAR.

13 THE COURT: YEAH.

14 MS. DERMODY: THE PRIOR DEFENDANTS PAID A HUNDRED
15 PERCENT, 100 PERCENT OF WHAT WAS IN THE SETTLEMENT AGREEMENT.

16 WE EXPECT THESE DEFENDANTS WILL PAY 100 PERCENT OF WHAT IS
17 PROMISED IN THE SETTLEMENT AGREEMENT.

18 THE ONLY TIME THAT THERE'S ANY POSSIBILITY THAT THERE WILL
19 BE A PRO RATA REDUCTION IS IF YOU HIT A THRESHOLD OF OVER 2500
20 NEW OPT OUTS AFTER WE HAD 61 THE LAST TIME AROUND.

21 SO THIS IS TALK -- THIS IS SORT OF EXPECTING THE WORST
22 POSSIBLE CASE SCENARIO THAT, BASED ON THE PRIOR SETTLEMENTS --
23 WE DIDN'T KNOW, PRIOR TO THOSE SETTLEMENTS, WHO WOULD OPT OUT.

24 NOW WE HAVE BETTER INFORMATION THAT VERY FEW PEOPLE OPTED
25 OUT LAST TIME AND IT WAS A VERY SMALL SETTLEMENT AMOUNT.

1 THIS TIME, IT'S A MUCH GREATER SETTLEMENT AMOUNT. WE
2 DON'T HAVE ANY EXPECTATION THAT MORE PEOPLE WILL SUDDENLY
3 DECIDE TO EXERCISE THAT OPTION.

4 SO I'M -- I JUST WANT TO MAKE SURE YOUR HONOR UNDERSTANDS
5 THAT THEY'RE NOT GOING TO PAY LESS, NOT UNLESS YOU HAVE A VERY,
6 VERY LARGE NUMBER OF PEOPLE SUDDENLY COMING OUT OF THE WOODWORK
7 TO OPT OUT, WHICH WE HAVE NO REASON TO BELIEVE IS GOING TO BE
8 THE CASE.

9 THE COURT: OKAY. SEPARATE FROM THIS REVERTER,
10 SEPARATE FROM THIS REVERTER, IT DOES APPEAR THAT THESE LATER
11 SETTLING DEFENDANTS ARE PAYING A LOWER PROPORTION OF THEIR
12 POTENTIAL DAMAGES LIABILITY THAN THE EARLIER SETTLING
13 DEFENDANTS, AND IT DOESN'T MAKE SENSE TO ME BECAUSE THEY SHOULD
14 HAVE HAD LESS LEVERAGE THAN THE EARLIER SETTLING DEFENDANTS.

15 MS. DERMODY: I THINK I WOULD DISAGREE WITH THE FIRST
16 ASSUMPTION, YOUR HONOR.

17 THE COURT: OKAY.

18 MS. DERMODY: I DO THINK THAT THERE IS A SIMILAR
19 RATIO IN TERMS OF THE EARLIER DEFENDANTS AND THESE DEFENDANTS,
20 AND I CAN APPRECIATE WHY YOUR HONOR WOULD ASK THE QUESTION THAT
21 YOUR HONOR IS ASKING.

22 AND I THINK FROM OUR PERSPECTIVE, I WANT IT TO BE REALLY
23 CLEAR WHAT WE WERE LOOKING AT AND WHY WE THINK IT WOULD BE
24 MALPRACTICE FOR US, AS CLASS COUNSEL, NOT TO GIVE THE CLASS A
25 CHANCE TO HEAR THAT THEY COULD GET \$324.5 MILLION.

1 HERE'S HOW WE SAW THE LAY OF THE LAND, YOUR HONOR. SO
2 WHILE THE NINTH CIRCUIT DID NOT GRANT THE 23(F), AND WE WERE
3 DELIGHTED THAT THAT HAPPENED, THE NINTH CIRCUIT DID NOT GRANT
4 23(F) AND THEN RULE FOR US, AFFIRM ON THE MERITS.

5 SO FROM OUR PERSPECTIVE, THE ISSUE OF CLASS CERTIFICATION
6 IS STILL AN OPEN ISSUE ON APPEAL. SO THAT ISSUE DOESN'T GET
7 TAKEN OFF THE TABLE BECAUSE OF 23(F) BEING DENIED. THAT'S
8 STILL OUT THERE.

9 THE COURT: RIGHT. BUT WHAT IS YOUR NEGOTIATING
10 POSITION IF YOU HAD GONE TO TRIAL AND YOU HAD WON AND THEN YOU
11 HAD THE APPEAL PROCESS PENDING? YOUR NEGOTIATION LEVERAGE
12 WOULD HAVE INCREASED.

13 MS. DERMODY: ABSOLUTELY, YOUR HONOR.

14 THE COURT: IT WOULD HAVE INCREASED.

15 MS. DERMODY: SO LET'S TALK ABOUT THE TRIAL.

16 THE COURT: LET'S TALK ABOUT THE NINTH CIRCUIT. YOU
17 DON'T THINK, EN BANC, THERE WOULD HAVE BEEN A GOOD -- EN
18 BANC -- THERE WOULD HAVE BEEN A GOOD POSSIBILITY THAT THE CLASS
19 CERT ORDER WOULD HAVE BEEN AFFIRMED?

20 MS. DERMODY: I THINK IT'S A POSSIBILITY.

21 AND THEN WHAT ARE YOUR ODDS IN THE SUPREME COURT, YOUR
22 HONOR?

23 THE COURT: WELL, I THINK IF YOU WANT TO DO AN ORDER
24 THAT RESTRICTS CLASS ACTIONS, I DON'T KNOW IF THIS IS THE
25 POSTER CHILD FOR DOING THAT.

1 WHAT DO YOU THINK? DO YOU THINK THE SUPREME COURT WOULD
2 HAVE WANTED TO DO IT IN THIS CASE? YOU DON'T THINK PERHAPS
3 THERE MIGHT HAVE BEEN A LEGISLATIVE FIX? THIS WOULD HAVE BEEN
4 LIKE A LILLY LEDBETTER SITUATION WHERE THERE MAY HAVE BEEN A
5 LEGISLATIVE RESPONSE?

6 I MEAN, I JUST DON'T THINK THAT THIS IS THE -- IF THERE
7 WERE GOING TO BE A GOOD CASE FOR FURTHER RESTRICTING CLASS
8 ACTIONS, I'M NOT SURE THIS IS THE ONE.

9 MS. DERMODY: IT SOUNDS -- WHAT YOU'RE SAYING, YOUR
10 HONOR, SOUNDS LIKE CONVERSATIONS THAT ME AND MY PARTNERS HAVE
11 AROUND THE CONFERENCE ROOM TABLE ABOUT CASES ALL THE TIME,
12 INCLUDING THIS CASE, AND WHY IT'S SO HARD, WITH A CASE LIKE
13 THIS, TO KNOW WHAT'S THE RIGHT THING TO DO FOR A BUNCH OF
14 ABSENT CLASS MEMBERS WHOSE RIGHTS YOU HOLD IN YOUR HAND BY YOUR
15 NEGOTIATION.

16 AND WHEN YOU HAVE A CASE WHERE YOU CAN RECOGNIZE THAT
17 THERE IS A RISK, YOU HAVE TO TAKE THAT RISK SERIOUSLY. EVEN IF
18 YOU THINK YOU HAVE A GREAT CASE AND IT'S THE MOST WONDERFUL
19 CASE, YOU HAVE TO AT LEAST ACKNOWLEDGE THAT THE RISK EXISTS.

20 THAT'S ONLY ONE RISK. IT IS A RISK. IT MAY NOT BE EVEN
21 THE RISK THAT WE THOUGHT WAS THE GREATEST RISK.

22 I THINK YOUR HONOR MAY HAVE ASSUMED MORE THAN WE DID ABOUT
23 THE LACK OF RISK AT TRIAL, AND WE HAVE DONE JURY TESTING, AS I
24 KNOW THE DEFENDANTS HAVE DONE JURY TESTING -- AS ANYONE I'M
25 SURE THAT COMES BEFORE YOUR HONOR DOES IN A COMPLEX LITIGATION

1 IN THIS COURT -- TO FIND OUT WHAT JURORS THINK ABOUT THIS
2 EVIDENCE, WHAT JURORS THINK ABOUT THESE CLASS MEMBERS, WHAT
3 JURORS THINK ABOUT CERTAIN THEMES THAT ARE IN THIS CASE.

4 AND YOU HAVE TO BE SOBERED WHEN YOU DO THAT KIND OF
5 TESTING TO UNDERSTAND THAT WHILE YOU MIGHT HAVE GREAT EVIDENCE,
6 YOU HAVE TO OVERCOME A NUMBER OF HURDLES.

7 IN THIS CASE, AS THE COURT WELL KNOWS, WE HAD SEVERAL. WE
8 HAVE JURORS HAVE TO FIND UNANIMOUSLY THERE WAS AN OVERARCHING
9 CONSPIRACY AMONG ALL SEVEN COMPANIES; WE HAVE JURORS HAVE TO
10 FIND THAT THERE WAS IMPACT UNANIMOUSLY; AND JURORS HAVE TO COME
11 UP WITH A DAMAGES FIGURE THAT'S GOING TO RIVAL WHAT WE'VE
12 SECURED HERE, THAT IS, A SUM CERTAIN.

13 AND WHEN WE EXPLORE ALL OF THOSE THINGS, THOSE ARE VERY,
14 VERY REAL RISKS FOR PLAINTIFFS, VERY REAL RISKS.

15 AND THE PROBLEM FOR US, AS WE LOOK AT WHAT'S HAPPENED IN
16 OTHER ANTITRUST TRIALS IN THE LAST DECADE, IS THAT IT'S VERY,
17 VERY TOUGH.

18 THE COURT: LET ME ASK YOU A QUESTION. IN YOUR
19 PAPERS, YOU SAY AT LEAST TWICE, OR AT LEAST ONCE, THAT IF ONE
20 OF THE SEVEN DEFENDANTS WAS FOUND NOT TO HAVE PARTICIPATED IN
21 AN OVERARCHING CONSPIRACY, THE DAMAGES WOULD HAVE BEEN ZERO.
22 DO YOU REALLY THINK THAT'S THE CASE? IT WOULD HAVE BEEN ZERO?

23 MS. DERMODY: IF THE -- THAT'S NOT OUR POSITION. I'M
24 SAYING WHAT WE KNOW THE DEFENDANTS WOULD ARGUE, AND WE WOULD
25 HAVE TO PRESENT OUR POSITIONS AGAINST THAT. WE WOULD DISAGREE

1 WITH THAT.

2 BUT THEY WOULD HAVE ARGUMENTS ABOUT THAT BECAUSE OUR
3 THEORY OF THE CASE IS OVERARCHING CONSPIRACY. OUR DAMAGES
4 MODEL REFLECTS AN OVERARCHING CONSPIRACY.

5 THE DEFENDANTS WOULD MAKE ARGUMENTS THAT WE HAVE TO
6 CREDIT, YOUR HONOR.

7 I UNDERSTAND THE COURT'S SKEPTICISM BECAUSE THE COURT
8 KNOWS, AS WE KNOW, WHAT WE'VE UNCOVERED IN THIS CASE.

9 THE COURT: I'VE LOOKED AT -- THROUGH ALL THOSE
10 SEALING REQUESTS, I'VE LOOKED AT MUCH OF THESE DOCUMENTS
11 MYSELF, ALL THE E-MAILS, ALL OF THE REPORTS.

12 SO I'M ASKING YOU, HAVING GONE THROUGH A LOT OF THOSE
13 SEALING REQUESTS, WHICH WAS NOT VERY MUCH FUN, AND KNOWING WHAT
14 A LOT OF THE DOCUMENTS ARE IN THIS CASE, YOU REALLY THINK THE
15 DAMAGES WOULD HAVE BEEN ZERO IF THIS HAD GONE TO TRIAL?

16 I MEAN, I JUST FEEL LIKE THAT IS SUCH A STRETCH.

17 MS. DERMODY: WHAT I'M SAYING TO YOU, YOUR HONOR --

18 THE COURT: YEAH.

19 MS. DERMODY: -- IS THAT THERE IS A RISK.

20 THE COURT: UM-HUM.

21 MS. DERMODY: THERE IS A RISK. THERE'S A RISK THAT A
22 JURY MIGHT FIND THAT THERE WAS NO OVERARCHING CONSPIRACY, AND
23 YET, THEY MIGHT THINK THERE WAS AN IMPACT.

24 A JURY MIGHT FIND THAT THERE WAS AN OVERARCHING CONSPIRACY
25 AND NO IMPACT BECAUSE THE JURY MIGHT CONCLUDE THAT THESE

1 WORKERS ARE AMONG THE MOST DESIRABLE IN THE WORLD AND THEY HAD
2 PLENTY OF OTHER OPPORTUNITY TO GO OTHER PLACES BESIDES THESE
3 SEVEN COMPANIES. JURORS MIGHT CONCLUDE THAT.

4 JURORS MIGHT SAY THERE WAS AN OVERARCHING CONSPIRACY AND
5 THERE WAS SOME IMPACT, BUT WE DON'T LIKE PLAINTIFFS' DAMAGES
6 MODEL, THAT WE ACTUALLY LISTENED TO WHAT THE DEFENDANTS'
7 EXPERTS, SIX ECONOMISTS, ARE GOING TO SAY, AND WE THINK THAT IT
8 WASN'T \$3 BILLION. WE THINK IT WAS LESS THAN \$1 BILLION. WE
9 THINK IT WAS SOME SMALL FRACTION.

10 THE COURT: WELL THEN, WHY DIDN'T YOU ALL PROPOSE,
11 THEN, A BETTER, MORE ACCURATE, MORE PERSUASIVE DAMAGES MODEL?

12 I MEAN, YOU'RE ALMOST NOW A VICTIM OF YOUR OWN SUCCESS.
13 YOU'RE THE ONES THAT PUT OUT THE 3 BILLION NUMBER. THAT'S WHAT
14 HAS GOTTEN EVERYONE'S EXPECTATIONS SO HIGH. IF YOU ALL HAD NOT
15 BEEN SO AGGRESSIVE WITH YOUR DAMAGES MODEL AND THEORY, PERHAPS
16 WE WOULDN'T BE IN THIS SITUATION, RIGHT? YOU ARE THE ONES WHO
17 HAVE CREATED THE VERY HIGH EXPECTATIONS OF THIS CLASS.

18 MS. DERMODY: WELL, I THINK THAT'S INTERESTING
19 FEEDBACK, YOUR HONOR.

20 WE PUT TOGETHER THE MODEL THAT OUR EXPERT, INDEPENDENTLY,
21 DECIDED WAS THE MODEL TO REFLECT WHAT OUR EXPERT BELIEVED TO BE
22 THE BUT FOR WORLD IF THESE AGREEMENTS HAD NOT EXISTED. THAT
23 WAS OUR EXPERT'S POINT OF VIEW. FULL STOP.

24 WE HAVE TO ACKNOWLEDGE THE RISK THAT A JURY, HEARING A
25 WHOLE BUNCH OF DIFFERENT EXPERTS, EVEN AS WE THINK WE HAVE THE

1 BEST ONE, MIGHT COME TO A DIFFERENT PERSPECTIVE.

2 AND WHILE I WOULD LOVE IT IF I WAS TRYING THIS CASE TO
3 "THE NEW YORK TIMES" EDITORIAL BOARD, THE FACT OF THE MATTER
4 IS, WE WOULD BE TRYING THIS CASE TO THE JURORS THAT ARE HERE
5 AND WE HAVE TO DEAL WITH THE REALITY THAT THOSE JURORS MIGHT
6 NOT SEE IT THE WAY WE SEE IT, OR EVEN HOW YOUR HONOR HAS SEEN
7 THE EVIDENCE. THAT IS JUST A REALITY.

8 SO WHEN WE LOOK AT THOSE THINGS AND WE UNDERSTAND THAT
9 THERE IS SOME RISK AT EACH STEP OF THE WAY THAT WE'RE NOT GOING
10 TO EITHER PREVAIL, OR IF WE PREVAIL, NOT GET THAT AMOUNT OF
11 MONEY, AND WE HAVE IN HAND \$324 AND A HALF MILLION ON TOP OF 20
12 MILLION WE'VE ALREADY RECOVERED, AND WE CAN LOOK AT OTHER CASES
13 THAT HAVE BEEN TRIED IN THIS DISTRICT RECENTLY WHERE PEOPLE GOT
14 LESS THAN WHAT WE'RE GETTING AS A PERCENTAGE OF EXPOSURE --

15 THE COURT: OKAY. BUT THAT -- YOU KNOW, UNLESS YOU
16 SHOW ME THE DOCUMENTS IN THOSE LCD-TFD CASES, I JUST DON'T
17 THINK THAT'S USEFUL. THAT'S NOT USEFUL. THAT'S A TOTALLY
18 DIFFERENT CASE.

19 MS. DERMODY: BUT THERE WERE 14 GUILTY PLEAS IN THAT
20 CASE.

21 WE HAD NO GUILTY PLEAS HERE. IN SOME WAYS THAT CASE WAS
22 MUCH MORE COMPELLING ON THE EVIDENCE.

23 I MEAN, THEY'RE APPLES AND ORANGES IN SO MANY RESPECTS,
24 YOUR HONOR.

25 BUT I JUST WANT TO SAY THAT --

1 THE COURT: DO YOU REALLY THINK THAT PRICE FIXING ON
2 TV'S IS MORE COMPELLING THAN THE FACTS OF THIS CASE?

3 MS. DERMODY: WELL, I WILL USE A DIFFERENT CASE THAT,
4 AT LEAST FOR ME, COMPETES WITH THIS ONE FOR BEING COMPELLING,
5 AND THAT'S THE ABBOTT CASE, THE SMITHKLINE BEECHAM CASE THAT
6 WAS BEFORE JUDGE WILKEN THAT WAS A DRUG PRICE FIXING CASE FOR
7 AN AIDS DRUG, AND IN THAT CASE YOU HAVE A HISTORY OF ALLEGED
8 PRACTICE OF PEOPLE ELEVATING --

9 THE COURT: WELL, I STILL DON'T THINK --

10 MS. DERMODY: -- THE PRICE OF AN AIDS DRUG. THE JURY
11 GOT --

12 THE COURT: UNLESS YOU'RE GOING TO GIVE ME ALL THE
13 DOCUMENTATION SO I CAN FAMILIARIZE MYSELF WITH THE FACTS OF
14 THOSE CASES, I JUST DON'T THINK RANDOMLY PULLING OUT OTHER
15 VERDICTS OF OTHER CASES IS REALLY USEFUL.

16 MS. DERMODY: OKAY, YOUR HONOR. I MEAN, IF THERE'S
17 SOMETHING THAT WE COULD SUBMIT TO YOUR HONOR THAT WOULD BE MORE
18 HELPFUL, I WOULD BE REALLY MORE THAN HAPPY TO DO IT.

19 I THINK WHAT WE'RE STRUGGLING WITH IS THAT THE STANDARD
20 HERE IS NOT, YOU KNOW, WHAT MIGHT BE THE BEST POSSIBLE
21 SCENARIO.

22 THE STANDARD HERE IS SORT OF THE RANGE OF REASONABLENESS
23 BASED ON THE RISK IN THIS CASE. AND FROM OUR PERSPECTIVE, AS
24 PEOPLE THAT LIVED AND BREATHED AND SWEATED AND SACRIFICED FOR
25 THIS CASE, AND JUST 100 PERCENT DID EVERYTHING WE COULD FOR

1 THESE CLASS MEMBERS -- I MEAN, HONESTLY, YOUR HONOR, WE HAVE
2 DONE EVERYTHING WE COULD TO DO THIS CASE RIGHT -- WE BELIEVE
3 THAT THIS IS THE RIGHT THING TO DO FOR THE CLASS.

4 WE THINK IT WOULD BE ABSOLUTELY UNETHICAL FOR US TO SEE
5 THAT THERE WAS THIS MUCH MONEY AVAILABLE FOR THE CLASS ON THESE
6 CLAIMS AND TO IGNORE THAT AND GO TO TRIAL KNOWING THAT THERE
7 MIGHT BE A VERY STRONG RISK THAT THE CLASS GETS NOTHING.

8 THAT DID NOT SEEM AT ALL TENABLE TO US, YOUR HONOR, AND WE
9 JUST HAVE PROVIDED THE COURT VARIOUS BENCHMARKS WE THOUGHT
10 WOULD BE USEFUL TO SEE THAT THIS RISK IS SOMETHING THAT OTHER
11 GOOD LAWYERS, OTHER EXPERIENCED LAWYERS HAVE COME TO SIMILAR
12 RISK CALCULATIONS.

13 I MEAN, ONE OF THE MOST INTERESTING COMPARISONS, PERHAPS
14 TO US ONLY, IS WHAT WE PUT FORWARD IN THAT --

15 THE COURT: WASN'T THE LCD-TFT YOUR CASE? WASN'T
16 THAT LEIFF CABRASER?

17 MS. DERMODY: IT WAS OUR CASE.

18 THE COURT: OKAY. WHICH ONE, THE TOSHIBA OR BEST BUY
19 VERSUS HANNSTAR --

20 MS. DERMODY: TOSHIBA. WE TRIED THAT CASE, YOUR
21 HONOR.

22 THE COURT: UM-HUM.

23 MS. DERMODY: AND IN EXHIBIT A TO OUR REPLY BRIEF, WE
24 PUT FORWARD ALL OF THE ANTITRUST EMPLOYEE CLASS ACTIONS THAT WE
25 COULD FIND, AND WE PUT FORWARD WHAT WE UNDERSTAND TO BE THE

1 RESULTS IN THOSE CASES SO YOUR HONOR CAN SEE THEM.

2 AND I THINK WHAT IS INTERESTING IS TO LOOK AT EVEN THE
3 EBAY CASE, WHICH THE CALIFORNIA ATTORNEY GENERAL'S OFFICE
4 PROSECUTED, SOME OF THE BEST LAWYERS IN THE STATE ARE IN THAT
5 OFFICE, REALLY SMART, TALENTED PEOPLE, AND THE RECOVERY IN THAT
6 CASE WAS 1/23RD OF WHAT WE GOT HERE, AND THIS IS 20 -- I SHOULD
7 SAY THIS IS 23 TIMES WHAT THEY GOT THERE.

8 THESE --

9 THE COURT: WELL, UNLESS YOU'RE GOING TO SHOW ME THE
10 DOCUMENTS IN THAT CASE -- I DON'T BELIEVE THERE WAS CLASS CERT
11 IN THAT CASE. I DON'T BELIEVE THERE WAS SUMMARY JUDGMENT IN
12 THAT CASE. I DON'T THINK IT HAD GONE THROUGH THE DAUBERT
13 MOTIONS IN THAT CASE.

14 BUT REGARDLESS, I DON'T FIND IT VERY HELPFUL, UNLESS
15 YOU'RE REALLY GOING TO GIVE ME DEEP INFORMATION ABOUT THOSE
16 CASES, TO SAY, "ALL OF THESE OTHER CASES, BECAUSE I'VE SLAPPED
17 ANTITRUST LABELS ON THEM, ARE COMPARABLE TO THIS."

18 BECAUSE IF WE'RE JUST GOING TO TALK ABOUT RANDOM TRIALS, I
19 CAN DO THAT, TOO. I JUST DON'T THINK -- UNLESS WE GO DEEPLY
20 INTO WHAT THE FACTS ARE TO REALLY SEE IF IT'S COMPARABLE OR
21 NOT, IT'S TOO GENERAL, I THINK.

22 MS. DERMODY: OKAY, YOUR HONOR. WHAT WOULD BE
23 HELPFUL TO THE COURT?

24 THE COURT: SO EXPLAIN TO ME -- I MEAN, YOUR POSITION
25 APPEARS TO BE THAT IF ONE DEFENDANT WAS NOT FOUND TO HAVE

1 PARTICIPATED IN THE OVERARCHING CONSPIRACY, THEN DAMAGES WOULD
2 HAVE BEEN ZERO AND THE CLASS WOULD HAVE GOTTEN NOTHING.

3 BUT I DON'T THINK THAT'S TRUE. YOU ALSO WOULD HAVE THE
4 LEVERAGE TO APPEAL OR, YOU KNOW, THERE WOULD HAVE BEEN ANOTHER
5 SETTLEMENT. IT JUST WOULD HAVE BEEN LATER IN THE PROCESS.

6 MS. DERMODY: SO --

7 THE COURT: AND YOUR LEVERAGE -- ANYWAY, I JUST HAVE
8 CONCERNS ABOUT WHETHER THIS IS REALLY FAIR TO THE CLASS, AND I
9 HAVEN'T MADE A DECISION YET ABOUT WHAT I'M GOING TO DO. I'D
10 LIKE TO THINK ABOUT IT FURTHER.

11 BUT I DO HAVE A CONCERN ABOUT WHETHER THIS IS A SUFFICIENT
12 RECOVERY FOR THE CLASS. I -- YOU KNOW, I AM NOT AT ALL SAYING
13 THAT THE PLAINTIFFS HAVEN'T BEEN ZEALOUS ADVOCATES IN DOING
14 EVERYTHING POSSIBLE FOR THE CLASS, BUT I JUST DO HAVE A
15 QUESTION AND I NEED TO THINK ABOUT IT FURTHER.

16 MS. DERMODY: OKAY, YOUR HONOR.

17 THE COURT: SO IF THERE'S NOTHING MORE THAT YOU WANT
18 TO SAY?

19 NOW, YOU'RE GOING FOR \$81 MILLION. WHAT'S YOUR LODESTAR,
20 AND WHY SHOULD THAT GO TO YOU INSTEAD OF THE CLASS?

21 MS. DERMODY: YOUR HONOR, ALL WE'VE SAID IS TO NOTICE
22 THE CLASS THAT WE MIGHT REQUEST UP TO THAT. LAST TIME WE
23 NOTICED THE CLASS AND WE REQUESTED LESS THAN WHAT WE NOTICED.

24 IT'S THE BENCHMARK IN THE NINTH CIRCUIT. WE WOULD THINK
25 IT WOULD BE WARRANTED HERE GIVEN THE WORK IN THIS CASE.

1 THE COURT: WHAT'S YOUR LODESTAR? BECAUSE FROM THE
2 FIRST SETTLEMENT, IT LOOKED LIKE LEIFF CABRASER'S WAS, WHAT,
3 ABOUT 8 MILLION THROUGH OCTOBER OF, YOU KNOW, OCTOBER 30TH OF
4 2013, 8.4 MILLION.

5 SO WHAT'S THE LODESTAR IF YOU ADD UP ALL THE DIFFERENT LAW
6 FIRMS THAT ARE INVOLVED IN THIS LITIGATION?

7 MS. DERMODY: I DON'T HAVE THAT INFORMATION FOR YOUR
8 HONOR. I'M SORRY.

9 THE COURT: ALL RIGHT. SO FOR THE FIRST SETTLEMENT,
10 NOBODY LOOKED AT THAT FOR THE SETTLEMENT WITH LUCAS FILM,
11 PIXAR, AND INTUIT?

12 MS. DERMODY: I JUST DON'T HAVE THE NUMBERS HANDY FOR
13 YOUR HONOR. I'M SORRY. I DON'T WANT TO MISLEAD THE COURT.

14 THE COURT: OKAY. WELL, YOU KNOW, MR. SAVERI SAID
15 THAT HE WOULD FILE HIS FEES DOCUMENTS FOR THE FIRST SETTLEMENT.
16 I DON'T BELIEVE I GOT THAT.

17 WHAT ARE YOUR LAW FIRM'S -- WHAT'S YOUR LAW FIRM'S --

18 MR. SAVERI: AS OF THE TIME OF THAT, OF THE PRIOR
19 SETTLEMENT, MY FIRM'S LODESTAR WAS APPROXIMATELY \$4 MILLION.

20 THE COURT: OKAY. SO -- AND I BELIEVE THAT
21 SETTLEMENT WAS REACHED IN, WHAT, APRIL OF 2013? IS THAT
22 SOMEWHERE AROUND THERE? OR, NO, WHEN WAS THAT? SEPTEMBER?

23 MS. DERMODY: IT WAS APPROVED IN OCTOBER, YOUR HONOR.

24 THE COURT: RIGHT. BUT I -- I GUESS I'M TRYING TO
25 FIGURE OUT, YOU'RE SAYING UP TO THE POINT OF SETTLEMENT, SO

1 WHAT LINE ARE YOU DRAWING HERE? WHAT'S THE DATE,
2 APPROXIMATELY?

3 MR. SAVERI: I BELIEVE IT WAS OCTOBER OF LAST YEAR.

4 THE COURT: OKAY. SO THROUGH -- ALSO THROUGH SOME
5 POINT IN OCTOBER?

6 MR. SAVERI: YEAH.

7 THE COURT: OKAY.

8 MR. SAVERI: AND, YOUR HONOR, SINCE THAT POINT IN
9 TIME, I MEAN, WE DID A LOT OF ADDITIONAL WORK IN THE CASE.

10 THE COURT: SURE.

11 MR. SAVERI: THE LIEFF CABRASER FOLKS DID A LOT OF
12 WORK.

13 THE COURT: SURE.

14 MR. SAVERI: MY OFFICE DID. SO THERE'S ADDITIONAL
15 LODESTAR. I JUST WANT TO BE --

16 THE COURT: YES, I COMPLETELY UNDERSTAND THAT.

17 BUT YOU HAVE NO IDEA WITH REGARD TO -- I BELIEVE THERE
18 ARE, WHAT, AT LEAST THREE OTHER LAW FIRMS?

19 MS. DERMODY: TWO OTHER FIRMS, YOUR HONOR.

20 THE COURT: TWO OTHER FIRMS.

21 MR. SAVERI: I THINK IT'S FAIR TO SAY THAT BETWEEN
22 THE TWO OF US, WE HAVE THE GREAT MAJORITY OF THE TIME IN THIS
23 CASE.

24 THE COURT: SURE, SURE.

25 MR. SAVERI: I MEAN, AND THAT'S CONSISTENT WITH WHAT

1 YOU'VE SEEN IN THE CASE.

2 MS. DERMODY: YEAH. WE CAN GET THE ACTUAL NUMBER.
3 WE HAVE THEIRS.

4 THE COURT: OKAY. THE SETTLEMENT AGREEMENT SAYS THE
5 DEFENDANTS TAKE NO POSITION ON THE SERVICE AWARDS IF THE AWARDS
6 ARE \$25,000 OR LESS.

7 NOW, THE PROPOSED SERVICE AWARDS ARE 80,000. DOES THAT
8 MEAN THE DEFENDANTS ARE GOING TO TAKE A POSITION? OR YOU'RE
9 GOING TO REMAIN SILENT?

10 MR. VAN NEST: WE'RE GOING TO REMAIN SILENT, YOUR
11 HONOR.

12 THE COURT: OKAY.

13 MR. VAN NEST: THAT'S UP TO YOUR HONOR'S DISCRETION.

14 THE COURT: OKAY.

15 MR. VAN NEST: I WOULD LIKE TO COMMENT ON THE
16 SETTLEMENT OVERALL WHEN YOUR HONOR GETS TO US THOUGH.

17 THE COURT: ACTUALLY, WHY DON'T WE GO AHEAD AND DO
18 THAT NOW? I HAVE SOME OTHER MORE MECHANICAL QUESTIONS ABOUT
19 THE SETTLEMENT. THOSE CAN WAIT.

20 MR. VAN NEST: SURE.

21 THE COURT: SO -- YEAH.

22 MR. VAN NEST: JUST A COUPLE OF QUICK POINTS.

23 THE COURT: YES.

24 MR. VAN NEST: I THINK YOUR HONOR STARTED WITH THE
25 PREMISE SOMEHOW THAT THE SETTLING DEFENDANTS HERE ARE PAYING A

1 HIGHER PERCENTAGE THAN THE EARLIER -- A LOWER PERCENTAGE.

2 WE DON'T LOOK AT IT THAT WAY AT ALL.

3 THE COURT: OKAY.

4 MR. VAN NEST: AS A MATTER OF FACT, WE THINK WE'RE
5 PAYING A PREMIUM IN THAT IF YOU LOOK AT THE SETTLEMENTS THAT
6 YOU'VE ALREADY APPROVED, YOU APPROVED \$20 MILLION SETTLEMENTS.
7 THAT'S ABOUT 8 PERCENT OF THE CLASS.

8 I MEAN, IF YOU DO THE MATH, OUR SETTLEMENT SHOULD HAVE
9 BEEN BELOW \$300 MILLION. I MEAN, IF IT'S JUST COMPARABLE, IF
10 WE'RE JUST PAYING WHAT, THE SAME BASIS THAT THAT 20 MILLION
11 PAID, WE WOULD HAVE BEEN IN THE 250 TO 270 TO 280 RANGE.

12 AND BELIEVE ME, AS I THINK YOU KNOW --

13 THE COURT: HOW ARE YOU CALCULATING THAT?

14 MR. VAN NEST: OH, IF YOU JUST -- IF 8 PERCENT OF THE
15 CLASS IS WORTH 20 MILLION, WHAT'S THE OTHER 92 PERCENT WORTH?

16 IT'S NOT 324 MILLION. IT'S A NUMBER SOUTH OF 300.

17 SO OUR POINT IS, AND WE MADE IT REPEATEDLY IN DISCUSSIONS
18 WITH PLAINTIFFS, THAT, YOU KNOW, WE'RE PAYING MORE -- AT THE
19 NUMBERS WE'RE NEGOTIATING NOW, WE'RE PAYING MORE THAN THE FOLKS
20 THAT SETTLED OUT EARLIER, AND IN OUR SITUATION, WE FELT THAT
21 THE BIGGEST RISK IN THIS CASE WAS THE TRIAL ITSELF.

22 AND IF I COULD MAKE JUST A COUPLE OF POINTS ABOUT THIS
23 TRIAL, YOUR HONOR, THAT I THINK ARE SIGNIFICANT?

24 THE COURT: OKAY.

25 MR. VAN NEST: IT IS TRUE THAT DR. LEAMER BASED HIS

1 DAMAGE MODEL ON AN ALL-IN APPROACH. IT WAS ALL SEVEN
2 DEFENDANTS PARTICIPATING. IF YOU TOOK OUT ONE OR MORE
3 DEFENDANTS, HIS MODEL FELL APART AND IN SOME CASES SHOWED THAT
4 SOME DEFENDANTS HAD OVERCOMPENSATED PEOPLE.

5 IN OTHER WORDS, HIS MODEL ONLY WORKED -- AND HE CONCEDED
6 THIS, WE'D BE HAPPY TO SUBMIT A SHORT BRIEF ON IT -- HE
7 CONCEDED THAT HIS MODEL WOULDN'T WORK IF NOT ALL DEFENDANTS
8 WERE FOUND TO BE PARTICIPANTS.

9 NOW, YOUR HONOR RECOGNIZES, AND COUNSEL SAID IT IN HER
10 BRIEF, THAT OBVIOUSLY THESE BILATERAL AGREEMENTS WERE ENTERED
11 INTO OVER A WIDE PERIOD OF TIME, SOME IN DIFFERENT INDUSTRIES,
12 AND SO ONE OF THE BIG RISKS IN THE TRIAL WAS THAT ONE DEFENDANT
13 WOULD BE OUT.

14 THE COURT: YES.

15 MR. VAN NEST: THE OTHER BIG RISK --

16 THE COURT: OKAY. BUT LET'S PLAY THAT OUT. SO WHAT
17 WOULD HAVE HAPPENED? YOU DON'T THINK THE JURORS, ONE
18 POSSIBILITY COULD HAVE BEEN TO TAKE OUT OF DR. LEAMER'S DAMAGES
19 MODEL, OR SOME PERCENTAGE OF THAT MODEL, TAKE OUT THAT
20 PERCENTAGE OF THAT DEFENDANT'S EMPLOYEES? OR YOU'RE SAYING
21 THAT -- YOU'RE SAYING THE JURY COULD HAVE COME UP WITH NOTHING?

22 MR. VAN NEST: YEAH.

23 THE COURT: IF THEY DIDN'T ACCEPT IT WHOLE HOG, THEY
24 WOULD COME UP WITH ZERO?

25 MR. VAN NEST: TWO THINGS.

1 THE COURT: IS THAT -- I JUST WANT TO KNOW --

2 MR. VAN NEST: YEAH.

3 THE COURT: -- WHAT ARE YOU SAYING?

4 MR. VAN NEST: ABSOLUTELY.

5 THE COURT: IF THE JURY FOUND THAT ONE, THEY WOULD GO
6 WITH ZERO? BECAUSE I -- I FIND THAT A LITTLE BIT DIFFICULT TO
7 BELIEVE.

8 MR. VAN NEST: I DON'T.

9 THE COURT: YOU THINK THAT THE JURY WOULD COME UP
10 WITH ZERO?

11 MR. VAN NEST: BUT HERE'S THE POINT. THEY HAD AN
12 EXPERT REPORT THAT WAS ONE FLAVOR.

13 THE COURT: UM-HUM.

14 MR. VAN NEST: ALL SEVEN IN, HERE'S THE NUMBER.

15 THE COURT: UM-HUM.

16 MR. VAN NEST: DR. LEAMER CONCEDED, IN DEPOSITION,
17 "IF YOU TAKE ONE DEFENDANT OUT, MY MODEL DOESN'T WORK."

18 THEY THEN -- WE THEN WOULD BE ARGUING TO YOUR HONOR, UNDER
19 COMCAST AND ALL THE RECENT SUPREME COURT CASES, THAT THEY DON'T
20 HAVE A DAMAGE MODEL TO GIVE TO THE JURY TO PRODUCE ANYTHING
21 OTHER THAN SPECULATION.

22 THE COURT: UM-HUM.

23 MR. VAN NEST: SO DO I THINK I HAD A CHANCE TO
24 PERSUADE THE JURY, GIVEN THAT, THAT THEY SHOULDN'T AWARD
25 DAMAGES BECAUSE THERE WASN'T A BASIS? YOU BET I DO.

1 BUT I THINK EVEN IF I HADN'T --

2 THE COURT: YOU WOULD HAVE A JMOL MOTION?

3 MR. VAN NEST: I WOULD HAVE A GOOD MOTION UNDER
4 COMCAST.

5 NOW, I DON'T, FRANKLY, THINK THAT THAT'S THE BIGGEST RISK.

6 THE COURT: YEAH.

7 MR. VAN NEST: I'LL TELL YOU, I THINK THE BIGGEST
8 RISK IN THIS CASE --

9 THE COURT: YEAH.

10 MR. VAN NEST: -- IS THAT THEY HAD A HUGE NUMBER,
11 \$3 BILLION, AND THE FACTS ON THE GROUND WERE THAT TECH
12 EMPLOYEES IN THE CLASS WERE PAID WAY ABOVE BOTH THE NATIONAL
13 AND THE REGIONAL AVERAGE, AND THEIR PAY WENT UP, NOT BY A
14 LITTLE, BUT EVERY YEAR IT WENT UP BY MORE THAN IT HAD EITHER
15 BEFORE OR AFTER THE CLASS PERIOD.

16 SO THERE'S A VERY STRONG ARGUMENT THAT THAT \$3 BILLION
17 NUMBER EVERYBODY IS TALKING ABOUT WAS ABSOLUTELY INCONSISTENT
18 WITH THE FACTS ON THE GROUND.

19 AND WHY DO YOU THINK THAT HE COULD HAVE --

20 THE COURT: BUT YOU'RE COMPARING THEM, WHAT, LIKE THE
21 PLAINTIFFS JUST TO THE AVERAGE INCOME IN SANTA CLARA COUNTY?

22 MR. VAN NEST: NO, NO, NO, NO.

23 THE COURT: BECAUSE THAT'S WHAT THEY DO IN THEIR
24 REPLY BRIEF.

25 MR. VAN NEST: THEY DO.

1 THE COURT: THEY JUST SAY, WELL, SANTA CLARA COUNTY,
2 AVERAGE INCOME IS THIS; THEREFORE, THERE WOULD HAVE BEEN A LOT
3 OF RESENTMENT THAT THESE ARE TECH WORK WORKERS THAT ARE MAKING
4 MORE THAN THE AVERAGE INCOME.

5 MR. VAN NEST: WHAT WE SAID IN OUR DAUBERT --

6 THE COURT: YEAH.

7 MR. VAN NEST: -- WAS THAT THEY ARE ABOVE THE
8 NATIONAL AND THE REGIONAL AVERAGE FOR TECH WORKERS. IF YOU
9 LOOK AT TECH WORKERS ON AVERAGE, IN THE NATION OR REGIONALLY
10 HERE, THESE CLASS MEMBERS WERE PAID WAY -- I'M NOT TALKING 1 OR
11 2 PERCENT -- BUT WAY ABOVE THAT AVERAGE AND THEIR PAY WENT UP.

12 THE COURT: BUT ISN'T THIS WHERE YOU COME IF YOU ARE
13 A TOP TECH WORKER?

14 MR. VAN NEST: SURE.

15 THE COURT: WOULDN'T YOU BE IN SILICON VALLEY --

16 MR. VAN NEST: ABSOLUTELY.

17 THE COURT: -- VERSUS IN BROKEN ARROW, OKLAHOMA?

18 MR. VAN NEST: SURE. MY POINT IS THAT THEIR WHOLE
19 CASE WAS PREMISED ON SOMEHOW PAY BEING SUPPRESSED; AND, YET, IN
20 THE CLASS PERIOD, PAY WENT UP MORE EVERY YEAR THAN IT HAD GONE
21 UP BEFORE OR AFTER.

22 THE COURT: BUT THE THEORY IS IT COULD HAVE GONE UP
23 EVEN MORE.

24 MR. VAN NEST: SURE.

25 THE COURT: AND I DON'T THINK THAT'S INCONSISTENT

1 WITH SAYING TECH WORKERS HERE MAKE MORE THAN TECH WORKERS IN
2 ALABAMA, MAINE, WHEREVER YOU WANT TO TALK ABOUT IT, AND THAT
3 THEIR SALARIES COULD HAVE BEEN EVEN HIGHER.

4 MR. VAN NEST: BUT YOU AND I --

5 THE COURT: I JUST DON'T THINK THAT'S INCONSISTENT.

6 MR. VAN NEST: BUT HOW MUCH DO YOU WANT TO GAMBLE ON
7 THAT? I MEAN, THERE HAVE BEEN A LOT OF BILLION DOLLAR CLAIMS
8 MADE IN OUR DISTRICT --

9 THE COURT: WELL, HOW MUCH DID YOU ALL WANT TO GAMBLE
10 WITH ALL OF THAT INFORMATION COMING OUT? HOW MUCH DID YOU ALL
11 WANT TO GO TO TRIAL ON THIS?

12 MR. VAN NEST: WE BELIEVE --

13 THE COURT: I MEAN, YOU'VE SEEN HOW OUR JURY POOLS
14 ARE HERE IN SAN JOSE. I THINK THEY WOULD HAVE FOUND THESE
15 DOCUMENTS VERY SIGNIFICANT AND PRETTY COMPELLING.

16 MR. VAN NEST: I'M NOT DISAGREEING WITH THAT.

17 THE COURT: THEY WOULD HAVE FOUND A LOT OF THE
18 TESTIMONY VERY COMPELLING. THEY WOULD HAVE FOUND A LOT OF THE
19 E-MAILS VERY COMPELLING.

20 HOW MUCH -- YOU KNOW, I UNDERSTAND WE'RE ALL FOCUSED ON
21 HOW MUCH THE PLAINTIFFS DIDN'T WANT TO GO TO TRIAL.

22 LET'S TALK ABOUT HOW MUCH THE DEFENDANTS DIDN'T WANT TO GO
23 TO TRIAL. HOW MUCH WAS THAT WORTH?

24 MR. VAN NEST: YOU CAN PRICE IT.

25 THE COURT: HOW COME YOU'RE NOT REALLY FOCUSING ON

1 THAT?

2 MR. VAN NEST: WE PRICED IT. IT'S \$324.5 MILLION.

3 IN OTHER WORDS, GIVEN ALL THE RISKS AND GIVEN MONTHS OF
4 WORK WITH JUDGE PHILLIPS, THAT'S WHAT WE -- THAT'S WHAT WE
5 CONCLUDED.

6 THE COURT: IT'S NOT JUST FINANCIAL RISKS. IT'S
7 OTHER DAMAGE THAT YOUR COMPANIES WOULD GET IN TRYING TO RECRUIT
8 OTHER EMPLOYEES AND WHAT THAT WOULD DO TO YOUR IMAGE, TO YOUR
9 GOOD WILL. I MEAN, IT WOULD HAVE HAD A LOT OF COST OTHER THAN
10 JUST STRICTLY MONETARY.

11 MR. VAN NEST: I'M NOT DENYING THAT ONE BIT.

12 BUT YOUR HONOR'S QUESTION, WHAT'S IT WORTH TO US, WE PUT
13 OUR MONEY WHERE OUR MOUTH IS, RIGHT? WE NEGOTIATED FOR A
14 SETTLEMENT AND ACHIEVED A SETTLEMENT THAT IS FAIR AND
15 REASONABLE TO THE CLASS IN LIGHT OF ALL THE RISKS.

16 I'M JUST POINTING OUT THAT THERE ARE LOTS OF RISKS ON THE
17 PLAINTIFFS' SIDE THAT MEAN THERE'S A REAL POSSIBILITY OF EITHER
18 A LOW VERDICT OR NO VERDICT OR A VERDICT THAT DOESN'T REACH THE
19 SETTLEMENT THAT WE'VE ACHIEVED.

20 FOR EXAMPLE, FOR EXAMPLE, WE ALL KNOW THAT YOU CAN COME
21 INTO COURT WITH A BILLION DOLLAR CLAIM AND END UP WITH A LOT
22 LESS MONEY, RIGHT? I MEAN, THAT HAPPENS ALL THE TIME.

23 AND IN THIS PARTICULAR CASE, THE FOCUS THAT YOUR HONOR
24 HAD, BECAUSE THAT'S WHAT WAS PRESENTED, WAS ON THE LIABILITY
25 SIDE, WE HAD SUMMARY JUDGMENT MOTIONS AND ALL THAT, AND A

1 LITTLE BIT ON THE DAMAGES SIDE IN THE DAUBERTS.

2 BUT THE REAL RISK IN THE CASE WAS --

3 THE COURT: WELL, THE DAMAGES ALSO CAME UP A LOT IN
4 THE TWO CLASS CERT ISSUES -- MOTIONS, EXCUSE ME.

5 MR. VAN NEST: TO SOME DEGREE, THEY DID.

6 THE COURT: YEAH.

7 MR. VAN NEST: BUT THAT'S WHERE THERE'S A HUGE RANGE
8 OF RISK, WHICH IS WHY I SAY THE NUMBER THAT WE ACHIEVED IS
9 ABSOLUTELY IN LINE, AND A LITTLE BETTER FOR THE PLAINTIFFS,
10 THAN THE NUMBER THAT WAS ACHIEVED IN THE FIRST SETTLEMENT.

11 SO GIVEN -- GIVEN THAT THAT'S 8 TO 10 PERCENT OF THE CLASS
12 THAT PAID \$20 MILLION, IT IS ABSOLUTELY FAIR AND REASONABLE FOR
13 THE REST OF THE -- FOR THE DEFENDANTS EMPLOYING THE REST OF THE
14 CLASS TO PAY THE 324.5 MILLION. IT'S IN LINE WITH IT, IT'S A
15 PREMIUM OVER IT, AND MAYBE THAT'S CONSISTENT WITH THE FACT THAT
16 THE CASE WAS A LITTLE MORE WELL DEVELOPED BY THE TIME IT GOT
17 THERE.

18 BUT I DO THINK THAT WHAT COUNSEL HAS SAID ABOUT THE RISK
19 OF A NO OR LOW VERDICT IS -- CANNOT BE IGNORED OR OVERLOOKED IN
20 THIS CASE GIVEN THE ECONOMIC FACTS ON THE GROUND, AND GIVEN
21 THAT EVEN YOUR HONOR RECOGNIZED THAT DR. LEAMER'S RESULTS AT
22 THAT T-SCORE WEREN'T STATISTICALLY SIGNIFICANT BY ANY MEASURE
23 THAT ANY ECONOMIST, MATHEMATICIAN, OR SCIENTIST HAS EVER
24 APPROVED.

25 AND ALTHOUGH THAT PASSED DAUBERT, IT MIGHT NOT PASS A JURY

1 TO HEAR THAT THIS GUY'S REPORT -- WHICH IS THE ONLY THING THAT
2 GIVES THEM A NUMBER -- WAS NOT STATISTICALLY SIGNIFICANT BY ANY
3 TRADITIONAL MEASURE OF SIGNIFICANCE IN ANY SORT OF SCIENTIFIC,
4 ACADEMIC, MATHEMATIC, OR EVEN INDUSTRIAL COMMUNITY.

5 AND THAT WAS A HUGE, SIGNIFICANT FACT FOR US FOR
6 PRESENTATION TO THE JURY AND, FRANKLY, THE ONLY -- THE ONLY
7 EVIDENCE, IF YOU WANT TO CALL IT THAT, THEY HAD OF THAT NUMBER
8 WAS DR. LEAMER'S OPINION.

9 THERE WASN'T ANY OTHER INTRINSIC EVIDENCE THAT LEADS TO
10 THAT NUMBER. THE INTRINSIC EVIDENCE LEADS TO A SHOWING THAT I
11 MENTIONED OF PAY GOING UP AND BEING ABOVE AVERAGE.

12 SO IF HE DOESN'T HAVE A SIGNIFICANTLY SIGNIFICANT RESULT,
13 WOULD YOU HANG YOUR HAT ON A JURY TRIAL IN THAT SITUATION WHEN
14 YOU HAVE ONE EXPERT PRESENTING DAMAGES WHOSE T-SCORE IS HIGHER
15 THAN ANY OTHER COURT OR VERDICT THAT WE WERE ABLE TO FIND HAS
16 EVER SUPPORTED?

17 I MEAN, THAT'S ANOTHER FACTOR, I THINK, THAT CAUSED, YOU
18 KNOW, THE PARTIES TO COME WHERE THEY DID.

19 NOW, I WILL SAY THAT THIS SETTLEMENT WAS ACHIEVED OVER A
20 QUITE LONG PERIOD OF TIME. IT STARTED WITH MEETINGS, BUT IT
21 CONTINUED FOR MONTHS WITH JUDGE PHILLIPS ACTIVELY INVOLVED AND
22 JUDGE PHILLIPS GUIDING THE PARTIES TO WHERE WE ULTIMATELY ENDED
23 UP.

24 AND WHILE, OF COURSE, THE SETTLEMENT DISCUSSIONS ARE
25 CONFIDENTIAL, I DON'T THINK THERE'S ANY QUESTION THAT YOU HAD

1 KNOWLEDGEABLE, EXPERIENCED COUNSEL ON BOTH SIDES, AND A VERY
2 KNOWLEDGEABLE, EXPERIENCED MEDIATOR WHO WAS WELL AWARE OF ALL
3 OF THESE RISKS AND WHAT'S BEEN HAPPENING AT TRIALS HERE AND
4 AROUND THE COUNTRY.

5 AND, YOU KNOW, TO COME UP WITH THIS NUMBER, WHICH IS, I
6 GUESS, THE SECOND BIGGEST NUMBER IN HISTORY FOR A SETTLEMENT OF
7 THIS KIND, I THINK THAT'S A PRETTY SIGNIFICANT ACHIEVEMENT AND
8 I THINK THAT THE PARTIES DIDN'T COME TO IT OVERNIGHT. IT TOOK
9 A WHOLE LOT OF WORK AND A WHOLE LOT OF TIME AND EFFORT BY A LOT
10 OF PEOPLE TO GET THAT NUMBER DONE.

11 THE ONLY OTHER COMMENT I'LL MAKE IS THAT I THINK YOUR
12 HONOR'S COMMENTS ON THE SO-CALLED PRO RATA, IT -- THIS
13 SETTLEMENT IS A LITTLE BIT DIFFERENT IN THAT THERE'S NO CLAIMS
14 PROCESS. WE'RE JUST GOING TO WRITE CHECKS. WE HAVE THE
15 ADDRESSES. WE HAVE THE IDENTITIES. THERE'S NO CLAIMS PROCESS.

16 SO IT'S NOT A REVERTER IN THE SENSE THAT WE THINK OF
17 REVERSIONS. IT'S A SAFETY VALVE, IF A REALLY HIGH NUMBER OF
18 PEOPLE OPT OUT, TO GIVE THE DEFENDANTS THE FUNDS TO DEAL WITH
19 THOSE OPT OUTS.

20 NOW, I DON'T THINK ANY OF US EXPECT OPT OUTS AT THIS
21 LEVEL. THERE WERE 61 OPT OUTS FROM THE LITIGATION CLASS AND
22 NOT VERY MANY FROM THE SETTLEMENT CLASS.

23 AND SO I THINK THAT THIS REALLY IS A SAFETY VALVE, AND I
24 DON'T THINK IT'S FAIR TO THE PLAINTIFFS, OR US, TO SAY, "WELL,
25 THESE OTHER GUYS, THEIR PRO RATA STARTED AT THIS NUMBER."

1 YOU HAVE TO TAKE THE SETTLEMENT IN ITS ENTIRETY. IN OTHER
2 WORDS, WE DIDN'T NEGOTIATE ONE LITTLE PIECE AT A TIME. THIS
3 WAS ONE SETTLEMENT WITH A LOT OF MOVING PARTS AND A LOT OF
4 ELEMENTS, AND SO MAYBE WE GOT A LITTLE BETTER BLOW PROVISION,
5 YOU KNOW, IN TERMS OF A PRO RATA.

6 BUT WHEN YOU'RE PAYING 324 MILLION, MAYBE YOU'RE ENTITLED
7 TO IT. THOSE GUYS PAID 20 MILLION, AND SO THEIR RISK OF OPT
8 OUTS, WHATEVER IT WAS, YOU KNOW, THEY DIDN'T -- THAT AMOUNT OF
9 MONEY IS SO VASTLY DIFFERENT FROM THE MONEY THAT THESE
10 DEFENDANTS PAID THAT IT'S QUITE NATURAL TO SAY, AND TO EXPECT,
11 THAT A PRO RATA TYPE SAFETY VALVE MIGHT BE DIFFERENT.

12 AND WE DIDN'T NEGOTIATE THIS DEAL FROM THE EARLIER DEAL.
13 THIS SETTLEMENT WAS ACHIEVED BY THESE DEFENDANTS WITH THE
14 PLAINTIFFS BASED ON THE FACTS THAT WE HAD FROM OUR CASE.

15 AND SO WE -- I, FRANKLY, WASN'T EVEN AWARE OF WHAT THEIR
16 PERCENTAGE PRO RATA IN THE LUCASFILM DEAL WAS UNTIL IT CAME UP
17 THIS MORNING. I JUST KNEW THAT, GIVEN THE AMOUNT OF MONEY WE
18 WERE SPENDING TO RESOLVE THIS, AND THE POSSIBILITY THAT I WOULD
19 BE LEFT IN AN EXTREME CASE -- AND IT IS EXTREME -- WITH A LARGE
20 NUMBER OF OPT OUTS, I WANTED, ASKED FOR, AND NEGOTIATED HARD
21 FOR THE RIGHT TO GET SOME SMALL AMOUNT OF MONEY BACK TO DEAL
22 WITH THOSE SO THAT I COULD EITHER TRY OR RESOLVE THOSE CASES.

23 AND THAT'S ALL IT IS. IT'S -- IT'S ONE SMALL PIECE OF A
24 BIGGER RESOLUTION, AND I DON'T THINK IT'S FAIR TO COMPARE, YOU
25 KNOW, THAT PRO RATA TO ANY OTHER BECAUSE OUR SETTLEMENT WAS SO

1 MUCH BIGGER AND MORE SIGNIFICANT THAN THE ONE THAT YOUR HONOR
2 APPROVED A COUPLE OF MONTHS AGO. IT TOOK CARE OF 90-PLUS
3 PERCENT OF THE CLASS, SO IT'S A MUCH BIGGER DEAL FROM THAT
4 PERSPECTIVE.

5 SO I JUST THINK YOU HAVE TO TAKE ALL OF THESE ELEMENTS IN
6 CONTEXT OF THE OVERALL GLOBAL DEAL.

7 THE COURT: WHAT WAS THE NUMBER OF OPT OUTS IN THE
8 LUCASFILM/PIXAR/INTUIT? DO YOU HAVE THAT NUMBER NOW?

9 MR. VAN NEST: SIXTY-ONE --

10 THE COURT: WAS FOR THE LITIGATION CLASS.

11 MR. VAN NEST: -- OPTED OUT OF THE LITIGATION CLASS.

12 THE COURT: YEAH. SO THAT WOULD HAVE BEEN --

13 MR. VAN NEST: IT'S MORE FOR THE SETTLEMENT CLASS,
14 BUT IT'S LESS THAN 200, I THINK.

15 MS. DERMODY: IT'S 147, YOUR HONOR.

16 THE COURT: OKAY. AND THEY ARE THE ONES WHO OPTED
17 OUT OF BOTH THE LUCASFILM, PIXAR, AND INTUIT CLASSES, RIGHT?

18 MS. DERMODY: IT'S THE SETTLEMENT CLASS.

19 THE COURT: THE SETTLEMENT CLASSES.

20 MS. DERMODY: RIGHT. AND THEN 61 JUST OPTED OUT OF
21 THE LITIGATION --

22 THE COURT: OF THE LITIGATION CLASS. OKAY.

23 ALL RIGHT. AND THERE WAS A CLAIM FORM IN THAT SETTLEMENT?

24 MS. DERMODY: THAT'S RIGHT, YOUR HONOR.

25 THE COURT: OKAY. WELL, I WAS HAPPY TO SEE THAT

1 THERE'S NO CLAIM FORM HERE.

2 MR. VAN NEST: WE THINK IT'S BETTER FOR OUR MEMBERS.

3 MS. DERMODY: YEAH. AND WE'VE NOW TESTED THE
4 ADDRESSES, SO WE KNOW WE HAVE VERY GOOD ADDRESSES. WE'VE
5 UPDATED ALL OF THEM ONE TIME ALREADY, SO WE HAVE A GREAT DEAL
6 OF CONFIDENCE WE'LL REACH EVERYONE.

7 THE COURT: SO LET ME -- I HAVE SOME MECHANICAL
8 QUESTIONS.

9 YOU STOOD UP -- MR. GIRARD, LET ME DO MY MECHANICAL
10 QUESTIONS AND THEN I'LL GIVE EVERYBODY AN OPPORTUNITY.

11 MR. GIRARD: OKAY.

12 THE COURT: OKAY. THERE'S A PROVISION IN THE
13 SETTLEMENT AGREEMENT THAT SAYS THE NON-CASHED CHECKS GO TO
14 EITHER A CY PRES RECIPIENT OR FOR FURTHER CLASS DISTRIBUTION,
15 AND I WANTED TO GET A SENSE OF HOW THAT WAS LIKELY TO PROCEED.
16 WOULD THERE BE A CERTAIN AMOUNT -- I MEAN, CERTAINLY IF IT'S A
17 REALLY LARGE NUMBER, AT SOME POINT IT SHOULD GO TO THE CLASS
18 FOR FURTHER DISTRIBUTION --

19 MS. DERMODY: RIGHT.

20 THE COURT: -- VERSUS GOING TO A CY PRES RECIPIENT.

21 BUT HOW WERE YOU PLANNING TO APPROACH THAT QUESTION?

22 MS. DERMODY: YOUR HONOR, CAN YOU DIRECT ME TO WHERE
23 YOU ARE IN THE SETTLEMENT?

24 THE COURT: YEAH, SURE.

25 MS. DERMODY: I'D BE HAPPY TO TAKE A LOOK AT THAT

1 CLAUSE.

2 THE COURT: NO PROBLEM.

3 MS. DERMODY: OKAY.

4 THE COURT: I'M LOOKING AT -- ON PAGE 18 --

5 MS. DERMODY: THANK YOU.

6 THE COURT: -- IT'S PARAGRAPH 8 OF 4A IS THE SECTION.

7 MS. DERMODY: OH. YES, YOUR HONOR.

8 WE INTENDED TO COME BACK TO THE COURT SO THAT THE COURT
9 WOULD EITHER BLESS THE APPROACH OF CY PRES, OR WE COULD HAVE A
10 CONVERSATION WITH THE COURT TO DETERMINE WHETHER IT MADE SENSE
11 FROM AN ECONOMIC STANDPOINT TO PAY FOR THE MAIL TO
12 REDISTRIBUTE.

13 IT'S NOT EXPECTED, WITH THIS TYPE OF PROCESS, THAT WE
14 WOULD HAVE THAT MUCH MONEY AT THE END OF THE DAY BECAUSE IT
15 WOULD ONLY BE PEOPLE WHO RECEIVED CHECKS THAT THEY DIDN'T CASH,
16 AND IN A TYPICAL CASE, THAT MIGHT BE \$10,000 OR SOMETHING LIKE
17 THAT, MAYBE EVEN \$20,000.

18 BUT YOU DON'T TEND TO SEE A MILLION DOLLARS OF UNCASHED
19 CHECKS. THAT WOULD BE VERY RARE.

20 THE COURT: SO IS YOUR THINKING ABOUT THIS QUESTION
21 THAT IF IT TURNS OUT THAT THE AMOUNT IS EFFECTIVELY DE MINIMIS
22 AND WOULDN'T ACTUALLY PAY FOR ITSELF IN TERMS OF THE
23 ADMINISTRATIONS COSTS, TO THEN GIVE IT TO A CY PRES RECIPIENT?

24 MS. DERMODY: THAT'S RIGHT, YOUR HONOR.

25 THE COURT: BUT IF IT EXCEEDS THE COST OF

1 DISTRIBUTION AND ADMINISTRATION, THEN TO SEND IT TO THE CLASS?

2 MS. DERMODY: ABSOLUTELY, YES.

3 THE COURT: OKAY. ALL RIGHT. THAT'S FINE.

4 THIS DISPUTE FUND ISN'T DEFINED ANYWHERE AND IT'S NOT IN
5 THE NOTICE. THIS IS PARAGRAPH 6 ON THE SAME PAGE.

6 MS. DERMODY: YES, YOUR HONOR.

7 THE COURT: I WAS UNCLEAR ON IS THIS FUND MONEY THAT
8 GOES TO THE CLAIMS ADMINISTRATOR TO RESOLVE DISPUTES AND PAY
9 FOR ADMINISTRATION COSTS? OR IS THIS SORT OF A FUND THAT WILL
10 BE PAID TO ANY CLASS MEMBER WHO SUCCESSFULLY DISPUTES THEIR
11 PAYMENT AMOUNT?

12 MS. DERMODY: THE LATTER, YOUR HONOR, YES. IT'S --
13 WITH THE -- IT'S JUST TO MAKE SURE THAT THERE'S MONEY LEFT OVER
14 IN CASE THERE'S A CLASS MEMBER WHO EITHER HAS A RECORD KEEPING
15 ISSUE WITH THE DATA AND BELIEVES, AND CORRECTLY BELIEVES, THAT
16 HE OR SHE SHOULD HAVE HAD A HIGHER FORMULA PAY OUT, OR IF THERE
17 IS A PERSON WHO, FOR SOME REASON, DOESN'T RECEIVE A CHECK AND
18 THEY'RE IN THE CLASS DATA AND IT'S JUST A MISTAKE, EITHER ON
19 THE ADMINISTRATOR'S STANDPOINT OR IN THE DEFENDANTS' DATA
20 KEEPING OF PEOPLE IN THIS CLASS, THAT WE HAVE MONEY TO PAY
21 THOSE FOLKS WHO MIGHT SHOW UP JUST AFTER CHECKS ARE ISSUED.

22 THE COURT: AND NEITHER THIS DISPUTE FUND NOR THE
23 REVERTER OR THE CY PRES ISSUE ARE ACTUALLY IN THE NOTICE. WAS
24 THERE A REASON WHY THOSE WEREN'T INCLUDED IN THERE?

25 MS. DERMODY: NO, YOUR HONOR. BUT WE CAN CERTAINLY

1 ADD THEM.

2 THE COURT: OKAY. IF I APPROVE THIS SETTLEMENT, I
3 WOULD WANT IT TO BE ON A PRETTY TIGHT TIMEFRAME.

4 MS. DERMODY: YES.

5 THE COURT: AND THIS IS THE SCHEDULE I WOULD
6 RECOMMEND AND I WANTED TO SEE IF THAT WOULD BE FEASIBLE FOR THE
7 PARTIES AND FOR THE CLAIMS ADMINISTRATOR.

8 SO SUBMISSION OF REVISED NOTICE AND PROPOSED ORDER --
9 ACTUALLY, MOST LIKELY -- WE MAY JUST MAKE THE CHANGES OURSELVES
10 TO THE NOTICE.

11 BUT -- I GUESS THE TRANSFERRING OF THE MATERIALS FROM THE
12 PRIOR SETTLEMENT ADMINISTRATOR TO THE NEW ONE BY JUNE 30TH;
13 NOTICE MAILED AND POSTED TO THE INTERNET, JULY 14TH.

14 MS. DERMODY: YOUR HONOR, I'M SORRY. CAN I STOP YOU
15 ON THE VERY FIRST ONE?

16 THE COURT: YES. IS THAT TOO TIGHT?

17 MS. DERMODY: YES, I'M SORRY. HEFFLER AND GILARDI I
18 THINK HAVE TALKED ABOUT 20 DAYS FROM THE ORDER. IF THE ORDER
19 WAS TODAY, 20 DAYS WOULD BE JULY 9.

20 THE COURT: FOR, WHAT, THE TRANSFERRING OF MATERIALS?

21 MS. DERMODY: THE TRANSFER, YES.

22 THE COURT: OH. THEY NEED 20 DAYS?

23 MS. DERMODY: BECAUSE THERE'S SOME SECURITY ISSUES
24 AROUND THE DATA. IT'S NOT SOMETHING THAT CAN BE DONE SIMPLY.
25 I JUST WANT TO MAKE SURE THEY HAVE ENOUGH TIME TO DO IT

1 SECURELY AND THE RIGHT WAY.

2 THE COURT: ALL RIGHT. WELL, THEN, I ASSUME THAT
3 THAT WOULD PUSH EVERYTHING ELSE BACK.

4 MS. DERMODY: THAT'S WHY I STOPPED YOUR HONOR. I'M
5 SORRY.

6 THE COURT: OKAY. SO --

7 MS. DERMODY: IF IT WOULD HELP YOUR HONOR, I COULD
8 GIVE YOU A LIST I WROTE OUT IF WE USED JULY 9.

9 THE COURT: WELL, WHAT IF THAT WOULD BE JULY 14TH?
10 THAT WOULD BE THE DATE OF THE TRANSFER, ROUGHLY 20 DAYS FROM
11 MONDAY, JUNE 23RD.

12 THEN HOW MUCH TIME WOULD YOU NEED TO MAIL THE NOTICE AND
13 POST IT TO THE INTERNET?

14 MS. DERMODY: TWO WEEKS, YOUR HONOR. SO THAT WOULD
15 BE JULY 28, AND THAT'S A MONDAY.

16 THE COURT: OKAY. AND THEN THE MOTION FOR ATTORNEYS'
17 FEES AND COSTS, YOU'RE SAYING 31 DAYS FROM THE NOTICE DATE, SO
18 THAT WOULD BE ROUGHLY --

19 MS. DERMODY: AUGUST 28.

20 THE COURT: THAT WOULD BE AUGUST 28 OF 2014.

21 OKAY. AND THEN I GUESS I'M UNCLEAR. SOME OF THE DATES
22 ARE OFF THE -- THEY KIND OF SWITCH FROM THE NOTICE DATE BEING
23 THE ANCHOR DATE TO THE FINAL APPROVAL HEARING BEING THE ANCHOR
24 DATE.

25 MS. DERMODY: YES. I'M SORRY, YOUR HONOR.

1 THE COURT: WHAT -- I GUESS FOR THE MOTION FOR FINAL
2 APPROVAL, THAT WOULD BE 70 DAYS FROM THE NOTICE DATE, WHICH
3 WOULD HAVE BEEN JULY 28.

4 MS. DERMODY: SO IT MIGHT BE EASIER TO SET THE OPT
5 OUT OBJECTION DEADLINE, WHICH I THINK UNDER THIS WOULD BE
6 SEPTEMBER 11TH.

7 AND THEN WE MIGHT WANT TO HAVE TWO WEEKS FOR THE OPENING
8 BRIEF FOR FINAL APPROVAL, AND THAT WOULD THEN BE THREE WEEKS
9 BEFORE THE HEARING DATE.

10 THE COURT: YOU MEAN TWO WEEKS AFTER SEPTEMBER 11TH?

11 MS. DERMODY: CORRECT. THANK YOU.

12 (PAUSE IN PROCEEDINGS.)

13 THE COURT: HOW MUCH TIME AFTER THE MOTION FOR FINAL
14 APPROVAL IS NEEDED FOR THE CLAIMS ADMINISTER AFFIDAVIT OF
15 COMPLIANCE WITH THE NOTICE REQUIREMENTS?

16 MS. DERMODY: I THINK THAT THAT CAN BE 30 DAYS BEFORE
17 THE FINAL APPROVAL HEARING, YOUR HONOR. SO IF THAT HEARING WAS
18 ON OCTOBER 16, IT WOULD BE THE 30 DAYS BEFORE THAT. I THINK
19 THAT WOULD BE SEPTEMBER 16.

20 THE COURT: AND THE REPLIES WOULD BE?

21 MS. DERMODY: A WEEK BEFORE THE HEARING IF THAT WORKS
22 FOR YOUR HONOR.

23 THE COURT: I NEED TO CHECK -- MS. PARKER BROWN, CAN
24 YOU TAKE A LOOK AT OCTOBER 16?

25 OR WE COULD DO IT EVEN SOONER, OCTOBER -- HOW -- WHAT IS

1 THE EARLIEST DATE WE COULD DO IT THAT WOULD GIVE YOU ENOUGH
2 TIME TO GET EVERYTHING DONE?

3 MS. DERMODY: WELL, IF WE ARE FILING OUR OPENING
4 FINAL APPROVAL BRIEF ON SEPTEMBER 25, AND IF THERE'S GOING TO
5 BE ANY OBJECTOR BRIEFING THAT'S GOING TO FOLLOW THAT, THEN WE
6 MIGHT ACTUALLY KIND OF HAVE TO HAVE A BRIEFING SCHEDULE OF
7 SEPTEMBER 25, WITH THE EXPECTATION THAT SOMETHING GETS FILED BY
8 OBJECTORS A WEEK LATER, AND WE REPLY TO THAT BY THE 9TH.

9 SO THAT'S THE TROUBLE OF TRYING TO MOVE SOMETHING EARLIER
10 THAN THE 16TH I THINK, YOUR HONOR.

11 THE COURT: OKAY. SO THIS WOULD SAY THE REPLIES THEN
12 WOULD BE DUE OCTOBER 9, AND THE HEARING DATE WILL THEN BE
13 OCTOBER 16TH.

14 THE CLERK: ON OCTOBER 16TH, WE CURRENTLY HAVE --
15 YESTERDAY YOU SET DISPOSITIVE MOTIONS ON BRAZIL V. DOLE FOR THE
16 16TH.

17 THE COURT: UM-HUM.

18 (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
19 CLERK.)

20 MR. VAN NEST: YOUR HONOR, IN LIGHT OF THE PROBLEMS
21 WE'VE HAD ON THESE EARLIER ONES JUST WITH PAPERWORK AND
22 WHATNOT, I WOULD JUST SUGGEST MOVING IT BACK A WEEK OR TWO SO
23 WE DON'T HAVE TO COME BACK AND MOVE IT AGAIN.

24 THE COURT: YOU MEAN MOVE THE 16TH A WEEK?

25 MR. VAN NEST: MOVE IT BACK A WEEK. THE NOTICES

1 SLIP, THE NOTICES DON'T GET OUT, THE DATE IS NOT QUITE RIGHT.
2 WE'VE HAD THIS HAPPEN. WE THINK WE'VE GOT IT CLEARED UP, BUT
3 WE DON'T KNOW.

4 WHY NOT GIVE OURSELVES AN EXTRA WEEK AND THEN WE HAVE SOME
5 FLEXIBILITY?

6 THE COURT: LET'S SEE WHAT WE HAVE ON THE 23RD AND
7 THE 30TH.

8 MR. VAN NEST: YEAH.

9 (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
10 CLERK.)

11 THE COURT: WELL, NEITHER OF THOSE DATES ARE GREAT
12 FOR US, BUT I'M HAPPY TO --

13 THE CLERK: NOVEMBER 6TH MIGHT WORK.

14 THE COURT: WHAT'S ON NOVEMBER 6TH?

15 (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
16 CLERK.)

17 THE COURT: I -- YOU KNOW, IF I'M GOING TO APPROVE
18 THIS, I DON'T WANT TO DELAY PAYMENT FURTHER THAN NECESSARY.

19 YOU KNOW, I GUESS NOVEMBER 6TH IS PROBABLY SLIGHTLY
20 BETTER, BUT I'M FINE WITH ALSO HAVING THIS ON THE 23RD OR THE
21 30TH.

22 MR. VAN NEST: EITHER ONE IS FINE WITH US. ANY ONE
23 OF THOSE THREE DATES IS FINE, YOUR HONOR.

24 MS. DERMODY: SAME FOR US, YOUR HONOR.

25 THE COURT: OKAY.

1 (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
2 CLERK.)

3 THE COURT: I'LL GO AHEAD AND SET THIS ON
4 NOVEMBER 6TH IF I'M GOING TO APPROVE IT, AND THAT WAY WE CAN
5 EVEN BUILD IN A LITTLE TIME THROUGHOUT -- I ASSUME EVERYONE IS
6 AVAILABLE ON THE 6TH? IS THAT DATE OKAY?

7 MS. DERMODY: YES, YOUR HONOR.

8 MR. VAN NEST: YES, YOUR HONOR.

9 THE COURT: OKAY. I THINK THAT WAS IT. I MEAN,
10 THERE ARE SOME NITS ON THE NOTICE, BUT I DON'T THINK THEY'RE
11 IMPORTANT ENOUGH TO TAKE UP YOUR TIME.

12 I'LL GIVE EVERYONE A LAST OPPORTUNITY TO BE HEARD, AND
13 THEN WE'RE GOING TO TAKE A BREAK BEFORE I CALL MY LAST CASE.

14 MR. GIRARD: FINAL COMMENTS, YOUR HONOR.

15 THE COURT: OKAY.

16 MR. GIRARD: ON THE AMOUNT THAT THE DEFENDANTS ARE
17 PAYING, THE COURT REFERRED SEVERAL TIMES TO THE IMPLICIT, I
18 THINK I'LL CALL IT MARKET SHARE, IMPLIED BY THE EARLIER
19 SETTLEMENT, THE 20 MILLION, AND MR. VAN NEST POINTED TO 8
20 PERCENT.

21 THE COLLOQUY THAT OCCURRED BETWEEN THE COURT AND COUNSEL
22 AT PRELIMINARY APPROVAL ON THE EARLIER SETTLEMENTS --

23 THE COURT: UM-HUM.

24 MR. GIRARD: -- WAS THAT THE AMOUNT BEING PAID,
25 WHAT -- WHAT THE DISCUSSION WAS, WAS THAT THEY HAD 8 PERCENT OF

1 THE WORK FORCE, BUT THE AMOUNT THEY PAID AMOUNTED TO 5 PERCENT
2 OF THE TOTAL AMOUNT PAID.

3 SO THE IMPLICIT NUMBER, IF YOU USE 20 PERCENT AS A
4 BENCHMARK FOR THESE REMAINING DEFENDANTS, I COME UP WITH IS 400
5 MILLION, SO WE WOULD BE 75 MILLION SHORT IF WE WERE USING THAT
6 AS A BENCHMARK.

7 AND THE REFERENCE IS THE TRANSCRIPT OF THE PRELIMINARY --
8 PRELIMINARY APPROVAL HEARING AT PAGE 16, AND AT LINE 18,
9 THERE'S A DISCUSSION BETWEEN MS. DERMODY AND YOUR HONOR IN
10 WHICH THESE NUMBERS ARE BEING DISCUSSED AND THE 20 PERCENT --
11 OR 20 MILLION AND HOW THAT REPRESENTS 8 PERCENT OF THE WORK
12 FORCE NUMERICALLY, BUT 5 PERCENT FROM THE POINT OF VIEW OF THE
13 AMOUNT THEY PAID IN RELATION TO THE TOTAL AMOUNT OF SALARIES
14 PAID.

15 SO TO THE EXTENT I HEARD THE COURT TO BE SAYING THIS
16 NUMBER SEEMED LIGHT, I THINK THAT'S THE ANSWER.

17 SECOND, THE DISTRICT COURT -- THE COURT MADE A NUMBER OF
18 COMMENTS THAT, IN MY EXPERIENCE, THE COMMENTS HAVE BEEN PRETTY
19 EFFECTIVE IN FOCUSING THE MIND OF DECISION MAKERS ABOUT
20 SETTLEMENT, AND IF THE COURT DECIDED NOT TO APPROVE THIS AT
21 THIS STAGE AND SENT THE PARTIES BACK TO TRY AGAIN, I THINK
22 YOU'VE MADE IT PRETTY CLEAR, AND I HAVE A SENSE FROM THE
23 DISCUSSION WHERE THAT BENCHMARK IS, AND I HAVE A FEELING THAT
24 THAT -- THAT THE COURT'S COMMENTS ARE GOING TO ELICIT A
25 FAVORABLE RESPONSE. BUT THE ONLY WAY TO FIND THAT OUT IS TO

1 TRY.

2 A COMMENT ABOUT THE ROLE OF JUDGE PHILLIPS. I AGREE HE'S
3 A HIGHLY RESPECTED MEDIATOR AND VERY WELL EXPERIENCED.

4 HE WAS ALSO THE MEDIATOR IN THAT NFL CONCUSSION SETTLEMENT
5 WE CITED TO THE COURT THAT JUDGE BRODY DECLINED TO
6 PRELIMINARILY APPROVE AND HE, LIKE THIS CASE, HAD CONCLUDED
7 THAT SETTLEMENT WAS FAIR.

8 THE JUDGE DID NOT GRANT PRELIMINARY APPROVAL BECAUSE OF
9 HER CONCERNS WITH THE AMOUNT OF THE RECOVERY, AND IT'S NOT
10 BECAUSE JUDGE PHILLIPS WASN'T DOING HIS JOB. HIS JOB IS TO
11 BRING THE PARTIES TOGETHER TO AGREE ON THE NUMBER.

12 IT'S NOW THE JOB THIS COURT HAS TO DECIDE WHETHER THE
13 SETTLEMENT IS FAIR OR NOT.

14 SO I DON'T THINK IT'S ANY DETRACTION ON THE PERFORMANCE OF
15 JUDGE PHILLIPS TO POINT OUT THAT THE FACT THAT A MEDIATOR
16 BRINGS THE PARTIES TOGETHER DOESN'T MEAN THAT THE RESULTING
17 SETTLEMENT WAS FAIR, AND THE COURTS HAVE NOT TREATED THE ROLE
18 OF A MEDIATOR AS DISPOSITIVE ON THAT QUESTION.

19 LAST POINT. IF YOU DO DECIDE TO GO FORWARD AND GRANT
20 PRELIMINARY APPROVAL, OUR SUGGESTION WOULD BE THAT THE NOTICE
21 INCLUDE THE NUMBERS THAT WE'VE BEEN DISCUSSING IN THE SENSE
22 SPECIFICALLY OF THE POTENTIAL RECOVERY, THE RECOVERY PER
23 PERSON, AND WHAT THE RECOVERY WOULD BE ON THE THEORY OF DAMAGE
24 IF THE CASE WERE TO BE WON AT TRIAL SO THAT FROM THE
25 PERSPECTIVE OF A CLASS MEMBER -- AND FINALLY, THE AMOUNT OF

1 PERSONS IN THE CLASS -- SO THAT THE NUMBERS ARE RIGHT THERE AND
2 SOMEBODY DOESN'T HAVE TO GO DO THE MATH, BECAUSE I THINK THE
3 AVERAGE PERSON IS NOT GOING TO JUMP TO THE CONCLUSION THAT THEY
4 CAN DO THAT MATH AND THAT THAT'S GOING TO BE HOW THEY KNOW.

5 SO IT'S EASY ENOUGH TO DO THAT LANGUAGE. IF YOU APPROVE,
6 I WOULD PROPOSE LANGUAGE TO CLASS COUNSEL. I'M SURE WE COULD
7 AGREE ON AN INSERTION TO THE NOTICE THAT WOULD ADD THAT
8 INFORMATION.

9 AND SO IF YOU'RE GOING FORWARD, IT'S, I THINK, CONSISTENT
10 WITH THE NORTHERN DISTRICT'S RECENT GUIDELINES. THOSE CALL FOR
11 THIS INFORMATION IN THE MOVING PAPERS, AND A NUMBER OF COURTS
12 HAVE REQUIRED THAT INFORMATION IN THE NOTICE. IT'S REQUIRED
13 UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT, AND IT'S
14 EASY ENOUGH TO DO FROM A PRACTICAL PERSPECTIVE.

15 AND IF YOU WANT TO PROCEED WITH THIS SETTLEMENT, IT'S ONE
16 WAY OF GIVING THE CLASS MEMBERS THE INFORMATION THAT MR. DEVINE
17 WAS CONCERNED ABOUT.

18 THE COURT: YOU MEAN PUTTING IN THE \$141,331?

19 MR. GIRARD: YEAH. AND TO THE EXTENT THE CONCERN IS
20 THAT'S A TREBLED NUMBER, IT CAN BE CLARIFIED THAT THAT WOULD BE
21 AFTER TREBLING.

22 BUT I THINK, YEAH, THE SHORT ANSWER IS YES.

23 THE COURT: WHY DON'T I HAVE MR. VAN NEST, WHY DON'T
24 YOU RESPOND? I MEAN, IT IS TRUE THAT THE FIRST SETTLEMENT, THE
25 PERCENTAGE OF THE CLASS COMPENSATION WAS 5 PERCENT, AND THE

1 PERCENTAGE OF CLASS MEMBERSHIP WAS 8 PERCENT, AND IF WE DID
2 THAT STRAIGHT CALCULATION, IT WOULD HAVE BEEN HIGHER.

3 MR. VAN NEST: NO. THE NUMBER -- IT CONFIRMS
4 ABSOLUTELY THAT THE SETTLEMENT IS RIGHT IN THE SWEET SPOT.

5 IF 8 PERCENT IS THE BENCHMARK, AND THAT'S WHAT WE THOUGHT
6 WAS FAIR AND WHAT WE ARGUED IN THE MEDIATION, THEN OUR SHARE OF
7 THE SETTLEMENT WOULD HAVE BEEN 230 MILLION, BECAUSE IF 8
8 PERCENT OF THE CLASS -- IF THOSE DEFENDANTS, EMPLOYING 8
9 PERCENT, PAID 20 MILLION, THEN THE FULL VALUE OF THAT
10 SETTLEMENT IS 250 MILLION, ABSOLUTELY.

11 THE COURT: NO, NO, NO. THE PERCENTAGE -- OKAY, 8
12 PERCENT. BUT WHY SHOULD YOU GET THE SAME DEAL --

13 MR. VAN NEST: WE DIDN'T.

14 THE COURT: -- AS THOSE --

15 MR. VAN NEST: WE DIDN'T. WE GOT A DEAL THAT WAS 50
16 PERCENT MORE EXPENSIVE.

17 THE COURT: OKAY. LET ME HAVE MR. GIRARD -- OKAY.
18 TELL ME AGAIN -- AND I'M SORRY I DIDN'T WORK OUT THE NUMBERS IN
19 ADVANCE. I AGREE WITH YOU THE PERCENTAGE OF CLASS COMPENSATION
20 WAS 5 PERCENT. THE PERCENTAGE OF CLASS MEMBERSHIP WAS 8
21 PERCENT FOR THE INTUIT, LUCASFILM, PIXAR FILM.

22 WHAT WOULD THE NUMBER HAVE BEEN? I'M SORRY I DIDN'T
23 CALCULATE THIS IN ADVANCE.

24 MR. GIRARD: SO I'M DOING THE SAME DIVISION THAT
25 MR. VAN NEST IS DOING, BUT WITH 5 PERCENT INSTEAD OF 8 PERCENT,

1 WHICH GIVES YOU 400 MILLION. SO WE'RE --

2 THE COURT: OKAY. SO TELL ME WHAT YOU'RE DOING AND
3 WHY YOU ALL ARE COMING OUT WITH DIFFERENT NUMBERS. GO AHEAD.

4 MR. VAN NEST: NO, NO. WE'RE COMING OUT WITH THE
5 SAME NUMBERS, YOUR HONOR.

6 IF YOU LOOK AT IT AS 5 PERCENT OF THE COMPENSATION PAID --

7 THE COURT: UM-HUM.

8 MR. VAN NEST: -- IF THAT GROUP PAID 20, THEN THE
9 TOTAL VALUE OF THAT IS 400.

10 IF, HOWEVER, YOU LOOK AT IT AS 8 PERCENT OF THE CLASS THAT
11 YOU EMPLOYED, THEN THE TOTAL SETTLEMENT IS 250.

12 THIS NUMBER IS RIGHT IN THE MIDDLE OF THAT, WHICH IS WHY I
13 SAY IT'S AN ABSOLUTELY FAIR NUMBER. IT'S -- YOU COULD LOOK AT
14 IT ONE WAY OR THE OTHER. I THINK, AND I THINK THE DEFENDANTS
15 BELIEVE, THE FAIR WAY TO LOOK AT IT IS, WHAT PERCENTAGE OF THE
16 CLASS DID YOU FOLKS EMPLOY THAT PAID? AND WHO -- IF THAT'S --
17 THAT'S A WAY TO DIVIDE IT UP.

18 YOU COULD ALSO DIVIDE IT UP BASED ON THE PERCENTAGE OF
19 PAY.

20 BUT EITHER WAY YOU DO IT, THIS NUMBER IS RIGHT IN THE
21 SWEET SPOT OF WHAT IS NOT ONLY FAIR, BUT IN MANY WAYS A PREMIUM
22 OVER THE SETTLEMENT THAT YOUR HONOR APPROVED A COUPLE OF MONTHS
23 AGO. THAT'S ALL.

24 THE COURT: ALL RIGHT. LET ME HEAR FROM MR. GIRARD.
25 WHY SHOULD IT BE A PERCENTAGE OF THE CLASS COMPENSATION VERSUS

1 THE PERCENTAGE OF THE CLASS MEMBERSHIP?

2 MR. GIRARD: BECAUSE DAMAGES ARE AWARDED BASED ON
3 COMPENSATION, ONE.

4 TWO, BECAUSE THE EARLIER SETTLEMENTS TYPICALLY ARE FIRST
5 OUT SETTLEMENTS THAT ARE USED TO FUND THE LATER LITIGATION WITH
6 THE UNDERSTANDING THAT LATER SETTLING DEFENDANTS ARE GOING TO
7 PAY MORE.

8 AS YOUR HONOR ACKNOWLEDGED, THESE DEFENDANTS WERE FACING A
9 TRIAL. THE EARLIER DEFENDANTS SETTLED AT A TIME WHEN THERE WAS
10 LESS RISK IN THE CASE.

11 BUT EVEN IF IT'S A PURE APPLES TO APPLES COMPARISON, SINCE
12 DAMAGES ARE AWARDED BASED ON COMPENSATION, THE BENCHMARK NUMBER
13 IS 400, NOT THE NUMBER MR. VAN NEST SUGGESTED.

14 THE COURT: BUT DO YOU AGREE WITH HIM, IF THE
15 BENCHMARK WAS 8 PERCENT, THE NUMBER WOULD BE 250? DO YOU AGREE
16 WITH HIM ON THAT?

17 MR. GIRARD: WHATEVER THE MATH IS. I AGREE WITH HIM
18 ON THE MATHEMATICAL CALCULATION, SO IF YOU USE THAT, YES.

19 THE COURT: OKAY.

20 MR. GIRARD: IT DOESN'T ADDRESS THE ARGUMENTS ABOUT
21 THE HEIGHTENED RISK TO THE DEFENDANTS BECAUSE OF THE STAGE AT
22 WHICH THEY'RE SETTLING AND THE FACT THAT THEY CHOSE TO PLAY ON
23 THE HOPES THAT THEY WOULD GET OUT, THAT THEY WOULD GET THE
24 CLASS CERTIFICATION ORDER REVERSED, DIDN'T GET THAT, AND
25 TYPICALLY THEY PAY A PRICE FOR THAT BY HAVING TO PAY A HIGHER

1 PERCENTAGE.

2 MS. DERMODY: AND, YOUR HONOR, I JUST WANTED TO SAY
3 THAT CLASS COUNSEL, AT THE START OF THIS HEARING, ACKNOWLEDGED
4 THAT WHERE WE ARE RIGHT NOW IS PRICED IN A RATIO THAT'S VERY
5 SIMILAR TO THE FIRST TIME AROUND AND THAT WE BASED OUR DECISION
6 NOT ON THIS IDEA OF HAVING, YOU KNOW, EVEN MORE MONEY AND THIS
7 IS WHY WE'RE TRYING TO SELL THIS TO THE COURT, BUT ON THIS RISK
8 THAT WE THINK IS VERY REAL.

9 YOU KNOW, WHEN WE HAD THE FIRST SETTLEMENT, AS THE COURT
10 MAY RECALL, THE ONLY CORPORATE ADMISSIONS IN THIS CASE WERE
11 FROM THE PIXAR/LUCAS CORPORATE EXECUTIVES. THOSE ARE THE -- IN
12 SOME WAYS, THOSE WERE THE STRONGEST PIECES OF EVIDENCE IN THE
13 CASE, AND THEY CASHED OUT.

14 THERE WAS DIFFERENT EVIDENCE, SOME VERY GOOD EVIDENCE, BUT
15 DIFFERENT TYPES OF EVIDENCE PUTTING TOGETHER THE PIECES WITH
16 THE OTHER DEFENDANTS. SO YOU HAVE TO WEIGH SOME OF THOSE
17 ISSUES AS WELL.

18 AND I THINK, YOUR HONOR, THAT IF YOU WOULD TALK TO OUR
19 TEAM ABOUT WHO HAS BEEN DRINKING THE KOOL-AID ON THIS CASE THE
20 MOST, THEY PROBABLY WOULD NAME ME AS THAT PERSON WHO HAS BEEN
21 ZEALOUS ABOUT TAKING THIS CASE TO TRIAL.

22 BUT WHEN YOU GO THROUGH JURY TESTING AND YOU ACTUALLY SHOW
23 JURORS IN THIS DISTRICT THIS EVIDENCE AND TEST WITH THEM THEIR
24 ATTITUDES ABOUT THESE CLAIMS AND THESE CLASS MEMBERS, YOU HAVE
25 TO BE SOBERED ABOUT WHAT THE RISKS ARE WITH THIS JURY POOL,

1 WITH THIS EVIDENCE.

2 IT IS NOT WITHOUT, YOU KNOW, GREAT CONCERN THAT WE WOULD
3 EVER TAKE THIS CASE TO TRIAL, AND THAT'S WHY WE THINK THIS IS
4 AN EXCELLENT DEAL AND IT WOULD BE WRONG FOR US NOT TO PRESENT
5 IT TO THE CLASS.

6 THE COURT: OKAY. BUT WHY -- I MEAN, I WAS THINKING
7 OF THE 5 PERCENT, NOT THE 8 PERCENT. WHY SHOULDN'T YOU HAVE AT
8 LEAST GOTTEN THE SAME COMPENSATION AS THE EARLIER CASE?

9 YOU'RE SAYING BECAUSE YOUR CASE AGAINST THESE DEFENDANTS
10 WAS WEAKER THAN YOUR CASE AGAINST LUCASFILM AND PIXAR? I FIND
11 THAT KIND OF HARD CONSIDERING WHO THE KEY PEOPLE WERE, LIKE
12 STEVE JOBS. YOU HAVE THE -- YOU HAVE MR. CAMPBELL WITH GOOGLE,
13 YOU HAVE THE WHOLE FACEBOOK SOLICITATION, YOU HAVE THE
14 SOLICITATION WITH EBAY. I MEAN, BOTH MR. CAMPBELL AND
15 MR. SCHMIDT WERE INVOLVED IN THAT.

16 I MEAN, I SEE WHAT YOU'RE SAYING. CERTAINLY THE QUOTES OF
17 THE CEOS FOR LUCASFILM AND PIXAR WERE VERY GOOD FOR YOU.

18 MS. DERMODY: ESPECIALLY ABOUT THEIR MOTIVATION FOR
19 WHY THEY ENTERED INTO THE AGREEMENTS. THERE'S NO ONE ELSE WHO
20 HAS SAID THE THINGS THAT THEY SAID.

21 THE COURT: BUT I WOULD -- WELL, ANYWAY, YOU TELL ME.
22 SO WHY DO THESE DEFENDANTS GET A DISCOUNT? BECAUSE YOU THINK
23 YOUR CASE WAS WEAKER AGAINST STEVE JOBS?

24 MS. DERMODY: I DON'T THINK THAT THEY GOT A DISCOUNT.

25 THE COURT: YOU THINK YOUR CASE WAS WEAKER AGAINST

1 ERIC SCHMIDT?

2 MS. DERMODY: I THINK THE RATIO IS VERY SIMILAR IN
3 TERMS OF WHAT HAPPENED BEFORE AND WHAT HAPPENED NOW. AND I
4 UNDERSTAND. IT'S WHAT WE WRESTLED WITH OURSELVES ABOUT THIS
5 SETTLEMENT, YOUR HONOR.

6 IT'S BECAUSE, AT THE END OF THE DAY, THE RISK OF LOSING AT
7 TRIAL NEVER CHANGED.

8 AT THE END OF THE DAY, THE RISK OF LOSING CERTAIN PRETRIAL
9 ORDERS ON APPEAL NEVER CHANGED.

10 THE COURT: YOU KNOW, I WISH YOU HAD TOLD ME HOW WEAK
11 YOUR CASE WAS FOR CLASS CERT AND ON ALL THOSE DAUBERT MOTIONS.
12 I MEAN, THAT WOULD HAVE BEEN HELPFUL INFORMATION.

13 I WAS CERTAINLY HEARING A DIFFERENT TUNE --

14 MS. DERMODY: I DON'T THINK YOU --

15 THE COURT: -- FROM YOUR SIDE OF THE COURTROOM DURING
16 ALL THE PREVIOUS MOTIONS IN THIS CASE.

17 IF I HAD KNOWN WHAT A LOSER THIS WAS, PERHAPS, YOU KNOW --
18 THE COURT, YOU KNOW, DID 90-PAGE ORDERS.

19 MS. DERMODY: YOUR HONOR, I THINK WE'RE --

20 THE COURT: AND IF I HAD KNOWN WHAT A WEAK CASE THIS
21 WAS, PERHAPS THIS SHOULDN'T HAVE GOTTEN AS MUCH OF THE COURT'S
22 RESOURCES AS IT DID.

23 MS. DERMODY: BUT, YOUR HONOR, I THINK THAT --

24 THE COURT: YEAH.

25 MS. DERMODY: -- HOW THE COURT FEELS ABOUT IT IS

1 MAYBE, I THINK, IN FAIRNESS, NOT LOOKING AT THE FULL PICTURE.

2 THE COURT: OKAY.

3 MS. DERMODY: THIS HONESTLY IS ONE OF THE BIGGEST
4 SETTLEMENTS, ONE OF THE BIGGEST RESULTS EVER IN A CASE LIKE
5 THIS. IT IS THE SINGLE BIGGEST RESULT EVER IN AN ANTITRUST
6 EMPLOYMENT CASE, EVER, BY FAR, ON AN AGGREGATE BASIS OR ON A
7 PER CAPITA CLASS MEMBER BASIS.

8 IT IS A HUGE RESULT BY EXPONENTIALLY MORE THAN OTHER
9 RESULTS THAT HAVE BEEN ACHIEVED, INCLUDING THE EBAY/INTUIT
10 AGREEMENT, AND YOUR HONOR DOES KNOW A LOT ABOUT THAT ONE, IN
11 THIS DISTRICT.

12 ALSO, IN THE EMPLOYMENT CLASS ACTION WORLD, THERE HAVE
13 BEEN TONS OF EMPLOYMENT CLASS ACTIONS. THERE IS ONLY ONE THAT
14 HAD A GREATER RESULT THAN THIS. IT TOOK 23 YEARS AGAINST THE
15 U.S. GOVERNMENT.

16 THIS IS A HUGE ACHIEVEMENT. IT'S VERY SUBSTANTIAL. IT
17 MAY FEEL LIKE IT'S NOT THE WHOLE THING, THAT WE COULD HAVE
18 GOTTEN MORE.

19 AND, YES, I THINK IN EVERY SETTLEMENT, IT'S THE VIRTUE OF
20 SETTling IS YOU'RE COMPROMISING WHAT WAS POSSIBLE.

21 THE COURT: BUT ANSWER MY QUESTION. DO YOU BELIEVE
22 YOUR CASE WAS WEAKER AGAINST GOOGLE, APPLE, ADOBE, AND INTEL
23 THAN AGAINST LUCASFILM, PIXAR, AND INTUIT?

24 MS. DERMODY: NO.

25 THE COURT: BECAUSE THEY PAID A HIGHER PROPORTION OF

1 THEIR LIABILITY --

2 MS. DERMODY: THIS IS --

3 THE COURT: -- AND THEY SETTLED EARLY.

4 MS. DERMODY: RIGHT. THIS IS THE MARKET TESTING,
5 YOUR HONOR.

6 THE COURT: OKAY.

7 MS. DERMODY: WHEN YOU HAVE JURORS LOOKING AT
8 EVIDENCE, JURORS THINK VERY HIGHLY OF WHAT PEOPLE SAY AS
9 ADMISSIONS. THEY DON'T NEED TO CONNECT ANY DOTS. THEY CAN
10 TAKE IT AT FACE VALUE BECAUSE A PERSON SAID IT.

11 AND SO FROM A JUROR PERSPECTIVE, THERE ARE CERTAIN TYPES
12 OF EVIDENCE THAT ARE, THAT ARE VERY HOT. THEY'RE TOXIC, YOU
13 KNOW? THEY'RE -- THEY'RE ATOMIC.

14 AND THERE ARE OTHER TYPES OF EVIDENCE THAT REQUIRE LEAPS
15 OF LOGIC AND CONNECTING DOTS AND YOU HAVE TO HAVE JURORS THAT
16 ARE WILLING TO ROLL UP THEIR SLEEVES AND REALLY PUT THOSE DOTS
17 TOGETHER IN ORDER TO UNDERSTAND.

18 AND YOU MIGHT NOT GET THE JURORS THAT DO THE LATTER, BUT
19 YOU MIGHT GET JURORS THAT DO THE FORMER ALL DAY LONG BECAUSE
20 IT'S QUITE SIMPLE TO DO.

21 AND SO FROM A JUROR PERSPECTIVE, I DON'T KNOW IF I COULD
22 SAY THAT IT WAS STRONGER WITH THE LUCASFILM AND PIXAR -- I
23 DON'T KNOW THAT I WOULD SAY THAT.

24 BUT I WOULD SAY THAT SOME OF THE EVIDENCE WAS MUCH EASIER
25 FOR THEM, MUCH MORE ACCESSIBLE FOR THEM, AND IN THAT WAY, WE

1 HAD TO FIGURE OUT WHAT WOULD BE THE REACTION IN COMPARISON TO
2 THAT EVIDENCE WITH SOME OF THE OTHER DEFENDANTS.

3 IT IS A RISK, YOUR HONOR. IT'S A RISK WE HAD TO
4 ACKNOWLEDGE.

5 THE COURT: BECAUSE THE DOCUMENTARY EVIDENCE IN TERMS
6 OF E-MAILS I THINK WAS STRONGER AGAINST THESE DEFENDANTS THAN
7 AGAINST LUCASFILM AND PIXAR, EVEN IF THEIR CEO STATEMENTS WERE
8 MORE INFLAMMATORY.

9 MS. DERMODY: THERE WAS A TREMENDOUS RECORD IN THIS
10 CASE, YOUR HONOR, ABSOLUTELY.

11 AND IF I PERSONALLY BELIEVED THAT I COULD GO TO TRIAL
12 RIGHT NOW AND DO BETTER THAN WHAT WE'RE GIVING TO YOUR HONOR
13 TODAY, I WOULD DO IT. I WOULD DO IT A HUNDRED TIMES IN A ROW.

14 THE REASON WE'RE COMING HERE TODAY, YOUR HONOR, IS
15 BECAUSE, IN OUR BEST JUDGMENT, THIS IS THE RIGHT THING TO DO
16 FOR THIS CLASS. IF WE DIDN'T THINK THAT, WE WOULD NOT BE HERE
17 BEFORE YOU.

18 MR. VAN NEST: YOUR HONOR, COULD I MAKE ONE OTHER
19 COMMENT?

20 THE COURT: YEAH. I MEAN, YOU KNOW, THE RATIONALE
21 GIVEN IN THE BRIEFS IS, OH, THIS SAVES COURT RESOURCES. WELL,
22 YOU'VE ALREADY SPENT THIS COURT'S RESOURCES. THAT IS NOT A
23 RATIONALE.

24 THIS NEEDS TO BE THE FAIREST COMPENSATION, YOU KNOW, A
25 FAIR RESOLUTION FOR THE CLASS. THIS COURT WAS COMPLETELY

1 PREPARED TO GO TO TRIAL ON THIS CASE.

2 SO WHEN I HEAR, "OH, BUT WE SAVED YOU TIME," I'M SORRY,
3 THAT'S NOT COMPELLING TO ME. THAT'S NOT A GOOD REASON TO ADOPT
4 THIS. IT'S IN THE MOTION, IT'S IN THE REPLY, AND IT'S NOT
5 PERSUASIVE.

6 BUT GO AHEAD.

7 MR. VAN NEST: TWO OTHER POINTS.

8 YOUR HONOR, YOU TALK ABOUT WEIGHING EVIDENCE.

9 THE COURT: YEAH.

10 MR. VAN NEST: TWO THINGS. REMEMBER THAT THE EARLIER
11 PARTIES THAT SETTLED WERE PAYING GENERALLY LOWER SALARIES. THE
12 PARTIES THAT ARE SETTling HERE, PARTICULARLY GOOGLE AND APPLE,
13 WERE AT THE VERY TOP OF THE MARKET.

14 ALSO, LIKE I SAY --

15 THE COURT: BUT WHICH WAY DOES THAT CUT?

16 MR. VAN NEST: IT CUTS --

17 THE COURT: WHICH WAY DOES THAT CUT?

18 MR. VAN NEST: FOR JURORS --

19 THE COURT: I MEAN, THAT MEANS THAT THE EMPLOYEES
20 COULD POTENTIALLY HAVE EARNED EVEN MORE AND YOU SHOULDN'T BE
21 PAYING LESS THAN YOUR PROPORTION THAN LUCASFILM AND PIXAR.

22 MR. VAN NEST: IT CUTS IN THIS WAY: PEOPLE DO NOT
23 FEEL AS THOUGH THOSE EMPLOYEES WERE TREATED UNFAIRLY WHEN THEIR
24 PAY WAS 50 OR MORE PERCENT HIGHER THAN THE AVERAGE TECH WORKER.

25 IT'S HARD TO GET A JUROR TO AGREE THAT THAT'S

1 UNDERCOMPENSATION WHEN THOSE FOLKS ARE MAKING SUCH A PREMIUM
2 OVER EVERYBODY ELSE IN THE BUSINESS. THAT'S ONE THING.

3 THE OTHER KEY FACT IS THAT INTEL EMPLOYED 60 PERCENT OF
4 THE CLASS. SO 60 PERCENT OF THE CLASS -- YOUR HONOR KNOWS THIS
5 FROM THE EARLIER BRIEFING. THE EVIDENCE AGAINST INTEL WAS
6 RELATIVELY THIN, RIGHT? ONE BILATERAL AGREEMENT, VERY LITTLE
7 E-MAIL TRAFFIC. THAT WASN'T THE BARN BURNER OF THE CASE.

8 THE CASE THAT YOUR HONOR SAW EARLIER WITH COMMENTS BY
9 MR. CATMULL AND MR. LUCAS AND OTHERS WHERE THEY WERE INDICATING
10 THEY WANTED TO SUPPRESS PAY, THERE WAS NONE OF THAT IN THIS
11 GROUP OF FOUR.

12 AND IN PARTICULAR WITH RESPECT TO INTEL WHERE THERE WAS
13 ONLY A SINGLE AGREEMENT WITH A COMPANY THAT IT WAS DOING A LOT
14 OF BUSINESS WITH, I DO THINK THERE'S A REAL QUESTION --

15 THE COURT: RIGHT, OKAY. BUT THERE WAS MR. SCHMIDT'S
16 TESTIMONY AND SERGEY BRIN'S TESTIMONY THAT MR. OTELLINI OF
17 INTEL KNEW ABOUT THE APPLE/GOOGLE AGREEMENT, RIGHT?

18 MR. VAN NEST: BUT --

19 THE COURT: I MEAN, THERE WAS CERTAINLY EVIDENCE.
20 INTEL'S OWN EXPERT TESTIFIED THAT MR. OTELLINI WAS LIKELY AWARE
21 OF GOOGLE'S OTHER BILATERAL AGREEMENTS BY VIRTUE OF
22 MR. OTELLINI'S MEMBERSHIP ON GOOGLE'S BOARD.

23 I MEAN, I THINK THERE WAS -- INTEL CONCEDES THAT
24 MR. OTELLINI KNEW THE CONTENTS OF GOOGLE'S DO NOT COLD CALL
25 LIST, WHICH INCLUDED APPLE AND INTEL.

1 I MEAN, I --

2 MR. VAN NEST: BUT, AGAIN --

3 THE COURT: I THINK THERE WAS CERTAINLY EVIDENCE THAT
4 THE PLAINTIFFS COULD POINT TO THAT INTEL WAS AWARE OF OTHER
5 DEFENDANTS' AGREEMENTS AND THE COLD CALL AGREEMENTS OF OTHER
6 COMPANIES THAT INCLUDED OTHER COMPANIES, EVEN IF THEY DIDN'T
7 HAVE A DIRECT BILATERAL AGREEMENT WITH INTEL.

8 MR. VAN NEST: BUT, YOUR HONOR, THE ARGUMENT IS, IS
9 IT A FAIR SETTLEMENT? WE'RE TALKING ABOUT \$324 MILLION.
10 THAT'S ALL PRICED INTO THAT.

11 AND YOU HAVE MR. DEVINE SAYING, "WELL, IT SHOULD HAVE BEEN
12 A LITTLE BIT MORE." BALONEY. THAT'S ALL WITHIN THE RANGE OF
13 JUDGMENT AND THE RANGE OF EXPERIENCE AND THE RANGE OF RISK.

14 IT'S NOT AS THOUGH WE'RE LOOKING AT A 15 OR \$20 MILLION
15 SETTLEMENT. WE'RE LOOKING AT A \$324 MILLION SETTLEMENT WHICH,
16 NO MATTER HOW YOU CALCULATE IS, IS MANY, MANY FACTORS HIGHER
17 THAN WHAT THE EARLIER GUYS SETTLED FOR.

18 SO THIS IS ALL WITHIN THE RANGE OF DISCRETION AND
19 JUDGMENT. THAT'S WHY I THINK THIS IS NOT A CLOSE CALL MYSELF
20 GIVEN THE RISKS ON BOTH SIDES, GIVEN THE AMOUNT OF MONEY THAT
21 WAS ACHIEVED, GIVEN THE --

22 THE COURT: OKAY. BUT LET ME ASK YOU, IF YOU USE THE
23 5 PERCENT, THEN THIS IS ABOUT 76,000 -- 76 MILLION SHORT. WHAT
24 IS THAT?

25 MR. VAN NEST: WHY WOULD --

1 THE COURT: DO YOU AGREE WITH THE PLAINTIFFS THAT
2 THEIR CASE AGAINST YOU WAS WEAKER THAN THE CASE AGAINST
3 LUCASFILM AND PIXAR? OR WHAT'S YOUR VIEW?

4 MR. VAN NEST: I DON'T THINK IT'S --

5 THE COURT: NO, I'M JUST SAYING -- I UNDERSTAND YOUR
6 POINT THAT IF YOU USE THE PERCENTAGE OF CLASS MEMBERSHIP, THIS
7 LOOKS LIKE IT'S A NEGOTIATED AMOUNT.

8 MR. VAN NEST: EVEN --

9 THE COURT: BUT JUST --

10 MR. VAN NEST: LET'S USE YOUR NUMBER.

11 THE COURT: -- LOOKING AT THE 5 PERCENT.

12 MR. VAN NEST: LET'S USE YOUR NUMBER. IT'S A
13 QUESTION OF JUDGMENT. YOU CAN'T JUST MULTIPLY THE NUMBER OUT.
14 IT'S A QUESTION -- YOU'VE GOT A LOT MORE MONEY AT STAKE. THEY
15 HAS A SETTLEMENT OF \$20 MILLION.

16 THE COURT: OKAY. THAT'S WHY I WANTED TO KNOW, WHAT
17 IS IT THAT MAKES A DIFFERENCE?

18 MR. VAN NEST: WHAT MAKES IT --

19 THE COURT: IS IT BECAUSE WE'RE TALKING ABOUT LARGER
20 AMOUNTS OF MONEY? IS THAT SORT OF THE LOWER PERCENTAGE OR WHAT
21 IS IT?

22 MR. VAN NEST: IT'S ONE THING TO RISK 20 MILLION.

23 THE COURT: OKAY.

24 MR. VAN NEST: IT'S ANOTHER TO RISK 324 MILLION.
25 THAT'S A MUCH BIGGER RISK, RIGHT? I MEAN, JUST FROM THEIR

1 STANDPOINT OF COMPENSATING THE CLASS --

2 THE COURT: OKAY.

3 MR. VAN NEST: -- IT'S ONE THING TO SAY, "OKAY, I'M
4 GOING TO FORGO 20 MILLION AND TAKE MY SHOT."

5 IT'S QUITE ANOTHER THING TO SAY, "I'LL FORGO 324 MILLION
6 AND TAKE MY SHOT." I MEAN, THAT IS A VASTLY DIFFERENT
7 QUESTION.

8 AND, YES, THE EVIDENCE IS DIFFERENT IN THE TWO CASES AND,
9 YES, WE CAN ALL DISAGREE ABOUT WHAT IT MEANS.

10 BUT ULTIMATELY NONE OF THAT MATTERS BECAUSE IT'S A HUGE
11 RISK, ONE WAY OR THE OTHER, THAT THE JURY SEES IT YOUR WAY, AND
12 IF THEY DON'T, YOU HAVE SQUANDERED \$324 MILLION, WHICH IS NOW A
13 SURE THING, YOU KNOW, IF THE SETTLEMENT WERE TO BE APPROVED.

14 SO I DON'T -- I DON'T, FOR ONE MINUTE, THINK THE
15 DIFFERENCE BETWEEN 400 AND 324 IS MEANINGFUL, I DON'T, BECAUSE
16 THIS IS ALL WITHIN THE RANGE OF JUDGMENT.

17 YOU CAN'T JUST TAKE A RULER AND MULTIPLY IT OUT AND SAY
18 YOU'RE FALLING SHORT.

19 AND EVEN IF YOU DID THAT, IF YOU USE MY RULER, WE'RE
20 PAYING A PREMIUM. IF YOU USE THEIR RULER, WE'RE PAYING LESS.

21 BUT IT'S ALL WITHIN THE RANGE OF A REASONABLE RECOVERY FOR
22 THE CLASS IN LIGHT OF ALL OF THE VARIOUS RISKS. THAT'S WHAT IT
23 IS.

24 SO I DON'T THINK YOU WOULD REACH A DIFFERENT RESULT EVEN
25 IF YOU SAID, "I THINK THE FAIR WAY TO LOOK AT IT IS BASED ON

1 PAY, 5 PERCENT."

2 I STILL THINK THIS IS EASILY WITHIN THE RANGE OF A
3 REASONABLE RESULT GIVEN EVERYTHING WE'VE TALKED ABOUT.

4 YOUR HONOR AND I COULD DEBATE ALL DAY HOW THE EVIDENCE
5 COMES OUT, BUT YOU AND I BOTH KNOW, IT'S THE JURY THAT DECIDES,
6 AND THAT'S VERY HARD TO PREDICT, VERY HARD TO PREDICT.

7 AND I WOULDN'T, IN A MILLION YEARS, IF I WERE IN THEIR
8 SHOES, RISK \$324 MILLION ON WHAT I THOUGHT A JURY OF EIGHT
9 PEOPLE WAS GOING TO DO IN A CASE LIKE THIS WITH SO MUCH
10 DISPARATE EVIDENCE AND SO MANY DIFFERENT FACETS.

11 THAT'S, I THINK, THE KEY TAKE AWAY. IT'S A MUCH, MUCH
12 BIGGER RISK FOR THE CLASS.

13 MY ONLY OTHER COMMENT IS I DON'T THINK WE SHOULD BE
14 GETTING INTO PUTTING NUMBERS INTO THE NOTICE OF WHAT THE CLASS
15 COULD HAVE WON, I MEAN, BECAUSE THAT IS SO SPECULATIVE.

16 THE COURT: I'M NOT GOING TO DO THAT.

17 MR. VAN NEST: YEAH. THANK YOU.

18 THE COURT: ALL RIGHT.

19 OKAY. DO YOU WANT TO HAVE THE LAST WORD?

20 MS. DERMODY: I JUST WANT TO MAKE IT CLEAR ON THE
21 RECORD, YOUR HONOR, THAT EVERYTHING I'VE BEEN TALKING ABOUT
22 TODAY IS ABOUT RISK ASSESSMENT AND IT'S NOT ABOUT THE
23 PLAINTIFFS' FEELING ABOUT THE CASE BEING A WEAK CASE OR TRYING
24 TO TELL YOUR HONOR THIS WAS A DOG AND ALL OF THAT.

25 THE COURT: AND WHY WE WASTED YEARS ON THIS CASE.

1 MS. DERMODY: NO. IT'S US SAYING TO YOUR HONOR, WE
2 HAVE BEEN DRIVING THIS TRAIN AND WE RAN INTO JURY WORK, AND WE
3 HAVE BEEN SOBERED BY DOING THAT WORK AND BY LEARNING HOW
4 DIFFICULT IT IS TO CONVINCE A UNANIMOUS ROOM OF PEOPLE, EVEN
5 WITH THIS EVIDENCE, TO MEET THE STANDARD IN THIS CASE.

6 AND SO WHAT -- COULD WE HAVE DONE IT? IS IT POSSIBLE?

7 THE COURT: WERE YOU DOING RULE OF REASON OR WERE YOU
8 DOING PER SE IN YOUR JURY STUDIES?

9 MS. DERMODY: WE WERE DOING EVERYTHING IN THE MOST
10 FAVORABLE WAY TO US, INCLUDING THINGS LIKE TELLING THE JURY
11 ABOUT THE D.O.J. INVESTIGATION.

12 I MEAN, YOUR HONOR, I JUST -- YOU KNOW, THE RISK THAT --

13 THE COURT: I WOULD HAVE ALLOWED THAT PROBABLY.
14 PROBABLY.

15 MS. DERMODY: WELL, AT THE RISK OF EXPOSING A LOT OF
16 WORK PRODUCT THAT WE WOULD NOT WANT THE DEFENDANTS TO HAVE IF
17 THE COURT WAS TO DENY OUR REQUEST TO APPROVE THE SETTLEMENT, I
18 DO WANT THE COURT TO UNDERSTAND THE AMOUNT OF CONCERN AND
19 EFFORT AND THE EMPIRICAL WORK WE DID TO GET TO A PLACE WHERE WE
20 RECOGNIZE THAT THAT RISK WAS NOT THEORETICAL, THAT IT WAS REAL,
21 AND WE HAD TO AT LEAST ACKNOWLEDGE IT.

22 THE COURT: OKAY. ALL RIGHT. THANK YOU ALL VERY
23 MUCH.

24 MR. VAN NEST: THANK YOU, YOUR HONOR.

25 THE COURT: LET'S TAKE A BREAK BEFORE THE LAST CASE.

1 THANK YOU FOR YOUR PATIENCE FOR THE LAST CASE.

2 MS. DERMODY: THANK YOU, YOUR HONOR.

3 (THE PROCEEDINGS WERE CONCLUDED AT 3:22 P.M.)

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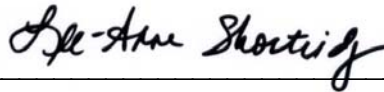
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3 CERTIFICATE OF REPORTER
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7 I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED
8 STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
9 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
10 CERTIFY:

11 THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
12 A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
13 ABOVE-ENTITLED MATTER.
14

15 
16

17 LEE-ANNE SHORTRIDGE, CSR, CRR
18 CERTIFICATE NUMBER 9595

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DATED: JUNE 24, 2014